Jurisdictional Statement

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81-244

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JEAN LORETTO, on behalf of herself and all others similarly situated,

Appellant,

v.

TELEPROMPTER MANHATTAN CATV CORP., TELEPROMPTER CORPORATION and CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

JURISDICTIONAL STATEMENT

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August 3, 1981

(11188)

QUESTIONS PRESENTED

1. Is a state statute which authorizes private cable television companies to install their cables and other equipment on the private property of others, without compensation, prior or otherwise, and which prohibits the property owner from interfering with such installations, invalid as a taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution?

2. Is such a statute invalid as a deprivation of property without due process of law in violation of the Fourteenth Amendment?

PARTIES

In addition to the parties named in the caption, the Attorney General of New York State intervened at the New

York Court of Appeals level to support the constitutionality of the challenged statute, as required by New York Executive Law §71. A copy of this Jurisdictional Statement is being served on the Attorney General as 28 U.S.C. §2403(b) may be applicable.

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REPORTED DECISIONS BELOW

The New York Court of Appeals decision on the merits, dated May 7, 1981, has not been published at this time. Prior to hearing the appeal, the Court of Appeals denied (without opinion) a motion to dismiss the appeal for want of a substantial constitutional question at 51 N.Y.2d 1007.

The decision of the New York County Supreme Court is reported at 98 Misc.2d 944, 415 N.Y.S.2d 180. The affirmance of the Appellate Division, without opinion, is reported at 73 A.D.2d 849.

JURISDICTION

This is a class action on behalf of affected New York State property owners seeking damages for trespasses consisting of the installation and

maintenance of coaxial cables and other equipment for the transmission of television signals on private property without compensation. An injunction is also sought against such conduct. A State statute permitting such conduct (Executive Law §828) is raised as an affirmative defense; its constitutionality is challenged in the complaint.

This appeal is taken from the decision and order of the New York State Court of Appeals, dated and entered May 7, 1981, which determined that the legislature may, in the exercise of the State's police power, permit private cable television companies to install cables and other equipment on the private property of others without paying any compensation to the property owner and without obtaining the owner's per-

mission. Notice of appeal was filed in the New York County Supreme Court on July 22, 1981.

This Court has jurisdiction pursuant to 28 U.S.C. §1257(2) because the validity of a state statute (Executive Law §828) has been drawn into question on the ground of its being repugnant to the Fifth and Fourteenth Amendments to the United States Constitution, and has been found to be valid by the highest court of the State.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The statute challenged as unconstitutional is New York's Executive Law §828(1) which, as amended to date, is set forth below:

"§828. Landlord-tenant relationship

"1. No landlord shall

"a. interfere with the installation of cable television facilities upon his property or premises, except that a landlord may require:

"i. that the installation of cable television facilities conform to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises, and the convenience and well-being of other tenants;

"ii. that the cable television company or the tenant or a combination thereof bear the entire cost of the installation, operation or removal of such facilities; and

"iii. that the cable television company [and the tenant]* agree to in-

*The bracketed material in paragraph a was

Footnote continued on next page.

demnify the landlord for any damage caused by the installation, operation or removal of such facilities.

"b. demand or accept payment from any tenant, in any form, in exchange for permitting cable television service on or within his property or premises, or from any cable television company in exchange therefor in excess of any amount which the commission shall, by regulation, determine to be reasonable; or

"c. discriminate in rental charges, or otherwise, between tenants who receive cable television service and those who do not."

Footnote continued from preceding page.

deleted by L. 1979 c. 479 §1. The underlined material in paragraph b was added by L. 1972, c. 467, simultaneously with the adoption of the balance of the statute (L. 1972, c. 466).

Appellant asserts that Section 828(1) is unconstitutional under the United States Constitution because it violates the Fifth Amendment* which provides:

> "nor shall property be taken for public use without just compensation"

and the Fourteenth Amendment which provides:

> "nor shall any state deprive any person of ... property, without due process of law."

STATEMENT OF THE CASE

Facts

Plaintiff, Jean Loretto, at the time of commencement of this action,

*The Fourteenth Amendment incorporates the taking clause of the Fifth Amendment and makes it applicable to the States. See e.g. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980).

owned a brownstone-type apartment house in Manhattan. In 1970, Defendant Teleprompter Manhattan CATV Corp.* installed on her roof two cables, each approximately 1/2 inch in diameter, extending across the width of her roof from the adjacent house on one side to the adjacent house on the other side. Along the route of each cable on her roof, Teleprompter installed directional taps (signal-splitting mechanisms permitting individual tenant service lines to be tapped in), each approximately 4" x 4" x 4". At various times since 1970, Teleprompter installed two large silver boxes along the roof cables and dropped

*The Complaint asserts that Teleprompter Corporation is responsible for the acts of Teleprompter Manhattan CATV Corp. For convenience, the two companies are referred to herein collectively as "Teleprompter".

a tenant-service line to the first floor so that it hung loosely down the front of Mrs. Loretto's building. This equipment was installed by the standard means used by Teleprompter -- i.e. the roof cables are attached by screws or nails penetrating the masonry at approximately two foot intervals, and other equipment is installed by bolts. The screws and bolts range from 1" to 2 1/2" in length.

The function and route of the cable are also typical of Teleprompter's installations: initially, the roof cables provided no service to Plaintiff's building; rather Teleprompter merely utilized Plaintiff's building as a highway for circumnavigating the entire city block and dropping service cables over the front or back of

any building along the way in which a tenant desired cable television service. In other words, what electric and water utilities do by installing feeder lines under or along public streets, with service lines coming into each property separately from the street, Teleprompter does by utilizing the roofs of privately owned buildings as if they were a public highway.*

Prior to the adoption of Executive Law §828, Teleprompter's practice was to obtain authorizations for the installations from the private property owners along the cable's route. In almost all cases Teleprompter paid compensation for that authorization. Where tenant service was provided, that

*Such installations, which utilize space on one property to service subscribers on another property, are referred to as "crossovers".

compensation was almost invariably five percent of the gross revenues realized from installations on the property.

Where owner consent for a cross-over could not be obtained, alternative means were and are available to Teleprompter. Although Teleprompter claims conclusorily that such alternatives are economically impractical, in fact, Teleprompter has often circumvented the buildings of nonconsenting owners by reaching the building to be serviced from the street or from a different neighbor.

Aside from Teleprompter's practice prior to 1973 of paying compensation, there was ample New York legal precedent confirming that a landlord was entitled to receive compensation for use of space outside of an apart-

ment for television wire or antenna purposes, or, alternatively, to enjoin such use. (See p. 36n, infra).

Effective January 1, 1973 the New York State Legislature enacted Executive Law §828 which provides that landlords may not interfere with the installation of cable television equipment on their property and may not receive compensation therefor from either the cable television company or tenants, other than as permitted by regulation adopted by the newly created State Cable Television Commission. Some three years after the effective date of Section 828, the Commission adopted a "Statement of General Policy" limiting compensation under normal circumstances to a one-time fee of $1.00. (See A7 and A122*).

*This reference is to the Appendix hereto.

The New York Court of Appeals, however, interpreted the compensation provisions as not requiring compensation but only permitting it at such level (not necessarily the "just" level required by the Constitution) as the commission may prescribe. (A36-7, A71, see also A22-4, A35-6). It held that compensation is absolutely unavailable under the statute with respect to crossovers. (A27-8).

Upon the effective date of Executive Law §828, Teleprompter terminated its previous practice of compensating property owners and no longer relied upon owner authorizations to enter and make installations upon private property.

Plaintiff commenced this action to challenge the practice under Execu-

tive Law §828. The New York Supreme Court has determined that Mrs. Loretto represents a class consisting of all owners of real property in the State of New York on which Teleprompter has installed cable television components, excluding only those servicing the only dwelling unit on the property where such unit is a single family residence (such cases being situations in which there is at least an implicit authorization from the owner).

The City of New York -- which itself has an arrangement by which it licenses Teleprompter to utilize the public streets for installing cables and other CATV equipment, and which itself charges a fee of five percent of Teleprompter's gross revenues for permitting such use -- intervened on Tele-

prompter's side.

Issues of Plaintiff's standing and her alleged non-exhaustion of administrative remedies were raised and resolved in Plaintiff's favor in both the Supreme Court and the Court of Appeals. The Court of Appeals also interpreted the statute's prohibition against landlord interference as covering both crossover and non-crossover installations.* Thus, the Court of Appeals has effectively eliminated all issues other than the constitutionality of Section 828.

Raising and Disposition of Issues Below

The constitutional questions pre-

*The Court of Appeals held, however, that compensation is precluded by the statute with respect to crossovers, and that the statute does not apply at all to installations on non-rental properties. (A27-8, A70n).

sented here were first raised in the complaint by means of a cause of action asserting the unconstitutionality of Section 828 under both the taking and the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution. (See Court of Appeals opinion A3-4). The answers invoked the statute as an affirmative defense. Upon motions by all parties for summary judgment, the New York County Supreme Court held the statute to be constitutional as a valid exercise of the police power. The issue was reasserted as the principal issue in the briefs on appeal to the Appellate Division and the Court of Appeals. The Appellate Division affirmed without opinion. The Court of Appeals affirmed

in a lengthy opinion on substantially the same basis as that of the Supreme Court.*

Chief Judge Cooke of the Court of Appeals dissented, stating that the statute at issue constitutes a per se taking because it authorizes a physical appropriation of a portion of the owner's property. Judge Gabrielli concurred in this view but voted with the majority because he viewed the statute as providing for a means of obtaining just compensation.**

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*The Court of Appeals had previously denied, without opinion, a motion by the State Attorney General to dismiss the appeal for want of a substantial constitutional question. (A106).

**The majority eliminated from the case the issue of whether a sufficient means for obtaining just compensation had been provided by the statute by interpreting the statute as not requiring any compensation whatsoever. See pp. 47-49, infra.

GROUNDS FOR PLENARY CONSIDERATION

A. The Statute Violates the Taking Clause By Authorizing A Physical Occupation Of Property Without Compensation

The decision of the New York Court of Appeals herein portends a revolutionary change in the law of eminent domain if permitted to stand. In the past, the courts have invariably found a permanent installation on private property under authority of the state to constitute a per se taking requiring just compensation. The instant case is, to our knowledge, the first case (with one unauthoritative exception*) in which any court has ever held

*See discussion infra, pp. 37-38 of Jackman v. Rosenbaum Co., 263 Pa. 158 (1919), aff'd, 260 U.S. 22 (1922). In that case, the Pennsylvania Supreme Court sustained a state authorized uncompensated trespass under the police power, and also on a common law easement theory; this Court, in affirming, pointedly declined to adopt the State court's police power theory.

that a state may, under the guise of the police power, permit a permanent installation to be made on private property without compensation or owner authorization.

The Court of Appeals reached this result by engrafting onto traditional taking jurisprudence a balancing approach which has previously been reserved for application only to regulation cases and has not been applied to cases of actual appropriation or physical occupation such as occurs here. The consequence is a fundamental rewriting of the taking clause. The traditional simple per se rule for physical occupations is displaced by a complex flexible standard under which the property owner's age-old right of exclusive possession may no longer be

depended upon, and under which a property owner faced with an apparent taking falling short of formal seizure of title could expect to face serious litigation not only on the issue of damages but on the issue of liability as well.

(1)

The rule that a physical appropriation of real property for an easement for the physical installation of equipment constitutes a per se taking requiring just compensation is so clear and firmly established that the issue has been seldom raised since the first decade or so of this century and has even more seldom been addressed by this Court.

Perhaps the most explicit relatively current statement of this Court

on the subject appears in United States v. Causby, 328 U.S. 256 (1946), where the Court recognized that, at least as to the usable space superadjacent to the real property,* the owner has an absolute right to exclusive possession. Thus, the Court stated,

> We would not doubt that if the United States erected an elevated railway over respondents' land at the precise altitude where its planes now fly, there would be a partial taking, even though none of the supports of the structure rested on the land. (328 U.S. at 264-65).

In an accompanying footnote, the Court approvingly quoted from Butler v. Fron-

*Airspace outside of this usable area was regarded as a "public highway". 328 U.S. at 260-261. The concept is comparable to the navigational servitude in navigable waters (see Kaiser Aetna v. United States, 444 U.S. 164, 170 (1979), a concept not applicable to this case.

tier Tel. Co., 186 N.Y. 486, 491, 492 (1906) to the following effect:

> ***an owner is entitled to the absolute and undisturbed possession of every part of his premises, including the space above, as much as a mine beneath. If the wire [a telephone wire in that instance] had been a huge cable, several inches thick and but a foot above the ground, there would have been a difference in degree, but not in principle. Expand the wire into a beam supported by posts standing upon abutting lots without touching the surface of plaintiff's land, and the difference would still be one of degree only. Enlarge the beam into a bridge, and yet space only would be occupied. Erect a house upon the bridge, and the air above the surface of the land would alone be disturbed.

More recently, the Court implicitly endorsed the continuing validity of the rule that a physical occupation is a per se taking in Andrus v. Allard, 444 U.S. 51, 65 (1979) by distinguishing a regulation, subject to a balanc-

ing test, from a case where there is "physical invasion or restraint upon" property.* This Court recently endorsed this rule again in Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979), by holding that

> the "right to exclude," so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.... And even if the Government physically invades only an easement in property, it must nonetheless pay just compensation.

These statements reflect the law as viewed by commentators. For example, Professor Michelman states in "Property, Utility and Fairness: Comments on the Ethical Foundations of

*Similarly, in Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978), this Court moved to a flexible test only after observing that the landmark designation involved no "taking" because there had been no physical occupation by government.

'Just Compensation' Law", 80 Harv. L. Rev. 1165, 1184-85 [emphasis in original]:

> The modern significance of physical occupation is that courts, while they sometimes do hold nontrespassory injuries compensable, never deny compensation for a physical takeover. The one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, "regularly" use or "permanently" occupy, space or a thing which theretofore was understood to be under private ownership. This may be true although the invasion is practically trifling from the owner's point of view.

Other authorities in accord include 2 Nichols, Law of Eminent Domain §§ 6.1 [1], 6.2 and 6.21; and 26 Am. Jur.2d, Eminent Domain §161.

(2)

This ancient rule that a physical occupation constitutes a per se taking must be distinguished from the parallel

rule of relatively recent origin that regulation of the enjoyment of property which goes beyond what are essentially undefinable limits may also constitute a taking or a deprivation of property without substantive due process.

The most fundamental error of the Court of Appeals in this case is in failing to recognize, or to accord proper weight to, the historical development of taking jurisprudence, through which the second rule evolved as a distinct and separate principle.*

*Appellant is mindful that difficult cases straddling taking and regulation concepts occasionally arise which may require adjustments in per se analysis. See e.g. Miller v. Schoene, 276 U.S. 272 (1928). The present case, however, presents no such subtle questions; it epitomizes conduct which has universally and invariably been adjudged a taking. The Court of Appeals' suggestion that the limitation of the statute's scope to landlord-tenant situations somehow immunizes it from attack under the taking clause (A41-2, A69-70) has no supporting precedent.

Prior to Pennslyvania Coal Co. v. Mahon, 260 U.S. 393 (1922), the taking clause was applied virtually exclusively to cases of actual seizure of title or of continuing physical occupation of property. Bosselman, Callies & Banta, The Taking Issue (U.S. Govt. Printing Office, 1973); see analysis in dissent below (A79-91). In Mahon, this Court adopted the view that a regulation which goes too far in restricting property rights may also be viewed as a taking. Mahon, in other words added a new concept to the old concept of taking, so that a taking could be found on a per se basis if there was physical occupation, and on a flexible basis if property was regulated but not invaded.

The dissent of Chief Judge Cooke from the New York Court of Appeals' de-

cision in this case excellently articulates the majority's erroneous historical interpretation of taking jurisprudence as well as can be done:

> Because courts often refer to instances of excessive regulation as takings, as the Supreme Court did in Mahon, the difference between regulation under the police power and taking, in the sense of appropriation, of property under the eminent domain power is sometimes misunderstood.
>
> What Mahon and the subsequent police power regulation cases have done is to create a right to compensation in addition to that already existing for the outright appropriation of private property. It is true that the courts over the years have been able to create "no set formula to determine where regulation ends and taking begins" (Goldblatt v. Hempstead, 369 U.S. 590, 594). The constantly changing nature of government regulation in a modern society and the myriad factual situations in which regulation can arise doom attempts to find simple answers. The courts have instead generally made "essentially ad hoc" determinations, with emphasis given to a variety of factors [citations omitted].

> Whatever difficulties courts have encountered in formulating a standard for determining when regulation under the police power is the equivalent of a taking, however, there has been no doubt whatever that the physical appropriation itself of property for public use -- the traditional form of a taking -- continues to require compensation. (A82-5).

The Court of Appeals in its decision in this case lost sight of the fact that the new view that regulation may constitute a taking added to the rights of property owners, which had formerly extended only to compensation for a traditional per se taking. Rather than viewing the property owner's rights under both theories as cumulative, the Court of Appeals has engrafted the balancing analysis required under the Mahon line of cases onto the traditional per se rule, concluding that a balancing approach is required even where there is a direct

physical appropriation of property. The Court of Appeals has thereby utilized what was intended by Mahon to be an expansion of property rights as a device for, in fact, taking away property rights.

(3)

In taking this approach, the Court of Appeals has necessarily misinterpreted a number of key decisions of this Court, thereby creating a substantial risk that other courts will follow suit and erode one of the Constitution's most clearly and firmly established principles.*

*It is noteworthy that the Court of Appeals decision has already been editorially reported upon in such places as 49 U.S.L.W. 1178, the New York Times, May 8, 1981, p. B1, col. 1, the New York Law Journal, May 8, 1981, p. 1, col. 6, and the New York Daily News, May 8, 1981, p. 20.

Thus, in stretching to distinguish precedents of this Court, the Court of Appeals interprets Kaiser Aetna v. United States, 444 U.S. 164 (1979) (and other cases) as allowing recovery only because the government's action there had a substantial economic impact and impaired the plaintiff's reasonable investment-backed expectations (A54-61). This utterly ignores this Court's language:

> [T]he "right to exclude," so universally held to be a fundamental element of the property right, falls within [the] category of interests that the Government cannot take without compensation. This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioner's private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina. Compare Andrus v. Allard, No. 78-740, slip op., at 14-15, with the traditional taking of fee interests in

United States ex rel. TVA v. Powelson, 319 U.S. 266 (1943), and in United States v. Miller, 317 U.S. 369 (1943). And even if the Government physically invades only an easement in property it must nonetheless pay just compensation. See United States v. Causby, 328 U.S. 256, 265 (1946); Portsmouth Co. v. United States, 260 U.S. 327 (1922). Thus, if the Government wishes to make what was formerly Kuapa Pond into a public aquatic park after petitioners have proceeded as far as they have here, it may not, without invoking its eminent domain power and paying just compensation, require them to allow free access to the dredged pond while petitioners' agreement with their customers calls for an annual $72 regular fee. (444 U.S. at 179-180; emphasis supplied).*

*If this Court's mention of economic impact in Kaiser Aetna qualified the traditional per se rule in any way (which we find doubtful), then the qualification necessarily resulted from the peculiar facts of that case, in that the Court was faced with a conflict between the public's ancient right of access to navigable waters under the commerce clause, on the one hand, and the taking clause, on the other.

As discussed below (pp. 51n, 58-61), we view Teleprompter's conduct here as constituting a taking even if analyzed on the basis of the economic impact standards mentioned in Kaiser Aetna.

The Court of Appeals also invokes Agins v. City of Tiburon, 447 U.S. 255 (1980), for the proposition that regulation does not amount to a taking if it does not "unreasonably impair the value or use" of the property. (A55-6). But this again ignores the fact that Agins (a zoning case) clearly involves no physical appropriation, occupation or invasion whatsoever and, therefore, unlike the present case, is properly analyzable under the Mahon balancing standard.

Similarly, the Court of Appeals ignored the pure regulatory context of Andrus v. Allard, 444 U.S. 51, 65-66 (1979) (A57-8), in citing that case for the proposition that "the denial of one traditional property right does not always amount to a taking." The accu-

racy of that observation in the context of a prohibition against the sale or transport of objects made from eagle feathers does not bear in any way upon a statute which authorizes a direct physical appropriation and occupation.

While the foregoing discussion does not analyze every case cited by the Court of Appeals, it sufficiently demonstrates that the Court of Appeals has mistakenly applied the reasoning of regulation cases to what is clearly a per se taking by physical occupation. The Court of Appeals has thus created a serious likelihood that other courts will "muddy"* the distinction between physical appropriation and regulation -- a distinction which until now has

*This is the expression of Chief Judge Cooke in his dissent. (A76-7).

been carefully preserved.

(4)

Neither the courts below nor Appellants have cited a single case holding that a government-authorized appropriation of a traditionally recognized property interest by means of physical occupation does not constitute a taking requiring just compensation.

The Court of Appeals relied heavily upon the recent decision of this Court in PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980). In PruneYard, this Court held that California may, within constitutional bounds, prohibit a shopping center owner from unreasonably restricting the exercise of free speech by members of the general public who are invited onto the premises. The decision, being

carefully limited to large mall-type shopping centers which recreate an urban environment, falls within the fact pattern of a long line of cases beginning with Marsh v. Alabama, 326 U.S. 501 (1946), in which such prohibitions are analyzed as regulations rather than takings.

PruneYard, however, is distinguishable because it does not result in the appropriation of any property to a particular use;* it does not require

*In this regard, PruneYard is distinguishable from Delaware, L. & W. R.R. Co. v. Town of Morristown, 276 U.S. 182 (1928), which the Court of Appeals incorrectly suggests would not be followed now in light of the PruneYard decision. (A64). In Delaware R.R., the offending state action was the appropriation of particular space for a taxi stand. If California had set aside a particular segment of the shopping center mall as a little "Hyde Park", for the exercise of free speech, rather than merely precluding the center from prohibiting petitioning, we submit that the action would have been condemned as an appropriation of private property exactly as this Court did in the Delaware R.R. case.

the property owner to admit any group of persons to his property. PruneYard simply holds that, once the owner has opened up his property to the general public, the state may constitutionally (and subject to substantial limitations as to the owner's right to regulate time, place and manner) regulate the owner's right to prohibit exercises of free speech commonly conducted in similar public plazas. (See Marsh v. Alabama, supra).* This Court

*While this Court would evidently no longer itself have imposed Marsh-type limitations upon the shopping center owner's property rights through an expansion of First Amendment coverage (see Hudgens v. National Labor Relations Bd., 424 U.S. 507 (1976)), the Court recognized that California may nominally impinge upon property rights in order to protect free speech rights granted under the State's own constitution. In the instant case, there is no claim that Teleprompter is exercising a First Amendment right which should be balanced against Appellant's property rights.

did not hold in PruneYard that the state may freely permit uninvited persons to make permanent unauthorized installations on property which is not only not open to the general public but as to which the owner earns his economic return by charging rent for occupany to a limited group of persons selected by him.*

*In particular, prior to the adoption of Section 838, a landlord's right to charge additional rent for cable television access was recognized even under New York City rent control regulations (A36n; see Schwartz v. McGoldrick, 118 N.Y.S.2d 154 (Sup. Ct. 1952) for similar provision under State rent control as to a roof antenna), and landlords had a well-recognized right to take remedial action against tenants using roof space for antennas and the like. See e.g. 349 East 19th Street, Inc. v. Bernstein, 99 N.Y.S.2d 299 (Sup. Ct. 1950); Prestipino v. Matarazzo, 99 N.Y.S.2d 606 (Sup. Ct. App. T. 1950) (erection and maintenance of a wire by the tenant outside of his demised premises prohibited); Kaplan v. Ladimer, 197 Misc. 270, 97 N.Y.S.2d 642 (Sup. Ct. App. T. 1950) (same holding); West Holding Corp. v. Cordero, 114 N.Y.S. 2d 668 (Sup. Ct. 1952) (window aerial prohibited); and other New York cases cited in Annot. 15 ALR2d 785 §7.

The Court of Appeals also rested its rejection of the per se rule on Jackman v. Rosenbaum Co., 263 Pa. 158 (1919), aff'd, 260 U.S. 22 (1922), and two New York State rent control cases. Again, we do not view these decisions as detracting from the per se rule. We acknowledge that the state court decision in Jackman v. Rosenbaum Co. sustained the denial of trespassory relief against a party wall owner on two alternative grounds: (i) that party walls straddling property lines do not constitute a trespass under long-standing Pennsylvania common law, and (ii) that the State may, in any event, permit a modest physical appropriation of property in the exercise of its police power. It is most significant that

this Court, in affirming, rested its decision solely on the Pennsylvania common law premise, thereby implicitly rejecting the notion that a taking does not occur just because the State finds it expedient to permit one owner to occupy a portion of his neighbor's land.

The rent control cases -- People ex rel Durham Realty Corp. v. LaFetra, 230 N.Y. 429 (1921), app. dismissed, 257 U.S. 665 (1921), and People ex rel Rayland Realty Co. v. Fagan, 194 App. Div. 185, 186 N.Y.S. 23 (2d Dept. (1920), aff'd, 230 N.Y. 653 (1921) -- were cited below as involving "[n]o less an invasion of the right to exclude than that of which plaintiff complains." (A50). The cases passed upon a statute suspending the right of land-

lords to evict tenants for a period of two years. However, the decision of the Court of Appeals rested upon the fact that prior compensation was in fact paid in the form of fair rental value.* The cases, therefore, fit within traditional eminent domain concepts (although they may also be distinguished on other grounds).

Finally, the Court of Appeals cites dicta in Pumpelly v. Green Bay Co., 13 Wall [80 U.S.] 166 (1871) (A64-5), and United States v. Cress, 243 U.S. 316 (1917) (A47n) to the effect that a physical invasion of property

*If property rights are here invaded, in a degree, compensation therefor has been provided, and possession is to be regained when such compensation remains unpaid." People ex rel Durham, supra, 230 N.Y. at 444.

constitutes a taking so long as the resulting damage is "substantial" or effectually destroys the property's usefulness.* But in both of these cases, the invasion was by water displaced as a result of construction of dams on parts of the waterway not located on the plaintiff's property. It is self-evident that, in the case of such an indirect invasion by water, factors other than the mere presence of the invading substance must be looked to in order to determine whether a taking has occurred if the courts are to be able to distinguish effectively between natural and artifical flooding, and between temporary trespasses and true

*In both cases, this Court found a taking so that it is impossible to conclude from the decisions that the Court would not have found a taking had the damage been less "substantial".

takings. See Sanguinetti v. United States, 264 U.S. 146 (1924). This rationale does not apply to a direct, intentional and permanent invasion such as exists in the present case.

In sum, the few cases* which the Court of Appeals found itself able to cite for the proposition that physical occupation of property does not necessarily constitute a taking simply do not support that proposition.

(5)

We conclude that, contrary to the view of the New York Court of Appeals', neither recent nor older Supreme Court decisions in any way derogate from the classical rule that physical occupation under governmental aegis constitutes a

*Counsel for Appellees cited no others.

per se taking. The incorrect interpretation of these cases by an eminent state appellate court necessitates prompt correction by this Court.

The dangers of applying the Court of Appeals' balancing approach to what were formerly per se takings goes far beyond the interests of the litigants in this particular case. If, as the Court of Appeals has held here, a taking does not occur in the case of a physical occupation unless the occupation materially and significantly impairs the property owner's use of his land, then juridical results formerly viewed as certain must be totally rethought. For example:

-- While a bridge spanning private property perhaps would still be viewed as a taking, it becomes doubtful

whether in all instances a wire, identically located, would necessarily constitute a taking. This view of course, is contrary to that expressed in United States v. Causby, supra, pp. 19-21.

-- The setting aside of a large taxi stand area in a railroad station on a 24 hour basis might be viewed as a taking whereas the setting aside of a smaller area for a few hours a day might not. But this conclusion would be contrary to the view expressed in Delaware, L. & W. R.R. Co. v. Town of Morristown, 276 U.S. 182 (1928).

-- One would expect that the installation of telephone poles across the front property line of a conventional residential urban or suburban building lot might continue to be viewed as a

taking. But, under the Court of Appeals' reasoning, such a result may become doubtful if the telephone poles were installed across a steep and otherwise unusable corner of a large rural property.

-- Similarly, the taking of an easement for highway purposes may be viewed as requiring condemnation and compensation, but the subsequent addition of telephone lines within the right of way may be viewed as de minimus and noncompensable. This would clearly be contrary to the view taken in the past by the New York Court of Appeals that the outcome of such a case depends exclusively on whether the additional use is within the scope of the original easement. E.g. Osborne v. Auburn Tel. Co., 189 N.Y. 393 (1907); and see Heyert v.

Orange & Rockland Utilities, Inc., 17 N.Y.2d 352, 271 N.Y.S.2d 201 (1966) (use of highway right of way for installation of gas main is a taking).

-- Under the Court of Appeals' view, it might be thought that underground pipelines barely affect usefulness of property so that no compensation would be required in such a case, although compensation would be required for an identical surface pipeline. This result, however, would contradict Southwestern Bell Tel. Co. v. Webb, 393 S. W.2d 117 (Mo. App. 1965).

One could cite many other examples, but these suffice to illustrate the chilling effect on the assertion of private property rights which would ensue if the Court of Appeals' decision in this case were allowed to stand. Under the traditional per se rule, a

property owner on whose property a physical installation had been made could know with absolute certainty that, if he sued, the only significant issue would be the measure of damages. Now, before suing, he must take into account the additional expense of litigating the rather difficult and subjective issues of the degree of limitation of his residual use, and the degree of public benefit achieved by the so-called "regulation".

Put slightly differently, as observed by Chief Judge Cooke in his dissent below, the property owner would face a radically different burden of proof. Under the traditional standard, the owner need prove only that "even a minimal amount of property" was taken. Under the Court of Appeals' new standard, the owner would have to demon-

strate "'that under no permissible use would the parcel as a whole be capable of earning a reasonable return or be adaptable to other suitable private use'" (quoting Spears v. Berle, 48 N.Y.2d 254, 263, 422 N.Y.S.2d 636 (1979)). (A87-9).

(6)

Normally, a finding of unconstitutionality under the taking clause would require two elements: a taking and a lack of just compensation. It must be emphasized that the second component has been eliminated as an issue in this case by the Court of Appeals' determination that Executive Law §828 does not require any compensation whatsoever, but merely permits it at such level (not necessarily the constitutional level of "just compensation") as

the commission may prescribe, and that, furthermore, the statute does not even permit compensation in the case of crossovers (A22-4, A27-8, A35-7, and A71).

Moreover, as Appellant argued below, where the taking is by a private party (as is the case here) compensation must be paid prior to the occupation to be constitutionally valid. 3 Nichols, Law of Eminent Domain §8.712. Yet Teleprompter has neither paid nor sought to pay any compensation at all, much less prior compensation.*

In view of the definitive interpretation by the Court of Appeals and the factual circumstances of this case,

*The statute's compensation provisions were also challenged below (and would be challenged here, if it were necessary) on procedural due process grounds.

we do not discuss here the possibility that the statute might be sustainable if Teleprompter had offered prior compensation or if the statute could be interpreted as requiring prior compensation, as the Court of Appeals has effectively mooted the just compensation issue. Scripto, Inc. v. Carson, 362 U.S. 207, 210 (1960); Wright, Federal Courts 488 (2d ed. 1970).

B. The Statute, Even If Viewed as A Regulation, Violates The Taking And Due Process Clauses

Although this case is a clear-cut instance of a per se taking, Executive Law §828 and Teleprompter's conduct also constitute a taking or a deprivation of property without due process when analyzed under police power regulation standards.

In brief, Executive Law §828 violates substantive due process and taking standards expressed in Goldblatt v. Hempstead, 369 U.S. 590 (1962), and Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), and applied in Prune-Yard Shopping Center v. Robins, 447 U.S. 74 (1980), and Kaiser Aetna v. United States, 444 U.S. 164 (1979), in that (i) the statute imposes an economic burden on persons (i.e. property owners) other than the beneficiaries of cable television, (ii) it promotes private gain of a commercial enterprise at the expense of invading private property rights although reasonable alternatives are available, and (iii) it interferes with reasonable investment-backed expectations of property owners.

(1)

Executive Law §828 oversteps the proper bounds of police power regulation by "'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole'". Armstrong v. United States, 364 U.S. 40, 49 (1960). Under Section 828, the benefit of free use by cable television companies of the private property of others is enjoyed by all subcribers to cable television. The burden, however, is imposed entirely on a limited class consisting of owners of rental properties.* These owners are expressly

*It cannot avail Teleprompter to argue that the economic effect of this "regulation" on Appellant and class members is slight as the same is true in Kaiser Aetna. The government action there threatened to deprive the devel-

Footnote continued on next page.

and absolutely prohibited from passing their loss on to their tenants even though the right to charge tenants for access to cable television was formerly expressly recognized under New York law. (See p. 36n, supra). The consequence is politically facile, but it is unfair and arbitrary to the point of illegality.

The Court of Appeals justified its ruling under this rubric by asserting that to permit landlords to charge

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Footnote continued from preceding page.

oper of $72 per licensee per year. One can glean from the facts recited in the opinion that this would amount to perhaps $120,000 per year, a drop in the bucket in the context of a 6,000 acre development having 1,500 waterfront lessees, and a community of some 22,000 residents, in which the developer had invested millions of dollars. In this case, Appellant estimates damages to the class for the period 1973 through 1980 to be in the range of $8,000,000 or an average of $800 per member of the class.

either their tenants or cable television companies for the right to install CATV facilities would result in the effective equivalent of an increase in rent. This would obviously be the case if the tenant were charged directly, but the assertion is not supported by either the record or by logic in the case of charges to the cable television company -- the relief sought here. Quite obviously, the additional cost would be passed on to all subscribers, tenant and non-tenant alike.*

*The record establishes that despite rate increases averaging 22% per year from 1973 through 1976, the number of subscribers increased sharply. Thus, it may not properly be anticipated that a pass-along of additional costs would materially adversely affect Teleprompter's business.

(2)

This Court has held in a regulation case that the "character" of the restriction on property rights is a factor in determining whether a taking has occurred. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978), see also Kaiser Aetna v. United States, 444 U.S. 164 (1979).

The "character" of the conduct here is the imposition of an easement on private property. This in itself would bring the case within the per se rule discussed above. (Supra pp. 17 to 49).

But treating Executive Law §828 as if it were purely a regulation, the "character" of the "regulation" would still militate against the validity of the statute. This is not an instance of

regulating purely for the benefit of the general public. Compare Penn Central Transp. Co. v. New York City, supra; PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980); and even Kaiser Aetna v. United States, supra. Rather, what is involved here is the imposition of an easement for the commercial advantage of private companies, with only incidental and modest (considering that the alternative is compensated easements resulting in slightly higher subscription charges) benefits to the public. Moreover, the use made of Appellant's property is not merely transient entry by some greater number of persons than would otherwise be the case (compare PruneYard), but a permanent installation of cables and other equipment.

In considering the "character" of the "regulation", it is appropriate to take into account the availability of alternative means of achieving the equivalent result. As was stated in National Labor Relations Board v. Babcock & Wilcox, Co., 351 U.S. 105, 112 (1956), accommodation between the governmental regulatory interest and the owner's property rights "must be obtained with as little destruction of one as is consistent with maintenance of the other". If, in other words, the regulatory objective can be accomplished with less impact on property rights, that approach should be selected.

One clear-cut alternative for Teleprompter is condemnation of ease-

ments.* This choice would merely result in passing on to the consumer one of the direct costs of providing service.

Another alternative is to proceed just as Teleprompter did prior to the effective date of Executive Law §828. Then, Teleprompter obtained licenses from willing owners at a fee -- generally 5% of gross revenues from the property, a level established by Teleprompter's own management policy. Where such licenses were unavailable and it was necessary to bypass a property, Teleprompter ran its cables

*Teleprompter is organized under the New York Transportation Corporation Law and, therefore, has the power of condemnation (A22-3) even though the Court of Appeals has ruled that it is not required to exercise that power because of Executive Law §828.

under public streets or from adjacent properties of consenting owners. Teleprompter's remonstration that such procedures are uneconomical is difficult to credit given the well-known existence in New York of under-street conduits for gas, electric, telephone, steam, water and sewer lines.

(3)

A third factor bearing on the constitutionality of a regulation of property rights is whether the regulation interferes with the property owner's "reasonable investment-backed expectations." Kaiser Aetna v. United States, 444 U.S. 906 (1979).

The Court of Appeals has held that Section 828 applies only to rental properties. Virtually by definition, then, these are properties which the

owners have invested in for the production of income and thus, a deprivation of the revenue-producing potential of a segment of the property frustrates the owner's reasonable investment-backed expectations.

The Court of Appeals, however, interprets that phrase as applying only to investments made for the specific purpose of realizing income from the particular right affected by the regulation. It points to Kaiser Aetna as a situation where the investment was made to open up Kuapa Pond for the express purpose of realizing revenue from members' use of the pond. (A61-3).

This is an insupportably restrictive view of the holding in Kaiser Aetna. It also suffers from misapplication to this case as the facts of

this case fall squarely within even the Court of Appeals' restrictive interpretation. Prior to the effective date of Executive Law §828 any investor in residential rental property in New York would have invested with the legal right (and, therefore, the reasonable expectation) of receiving a surcharge under the rent control laws for usage of cable television and also the right to exclude any kind of installation outside of the tenant's apartment for the reception of television signals. (Supra, p. 36n). Thus, that investor would clearly have had a "reasonable investment-backed expectation" of entitlement either to exclude Teleprompter or to receive income from Teleprompter's use of his property, both of which rights are taken away by

Executive Law §828.

(4)

The foregoing demonstrates that even if Executive Law §828 and Teleprompter's conduct thereunder were properly analyzed as regulatory activities, they could not be sustained. We reiterate, however, that the proper analysis is that Section 828 constitutes a per se taking.

CONCLUSION

The decision of the Court of Appeals substantially and dangerously rewrites the taking clause of the Fifth Amendment and misinterprets recent pronouncements by this Court on that subject.

Although we have focused here on the broadest implications of the Court

of Appeals' holding, it should be noted that the holding would bear directly on the validity of statutes similar to Executive Law §828 in Connecticut (Conn. Stats. Ann. §16-333[a]) and Massachusetts (Mass. Gen. Laws. Ann. Ch 166A, §22).

Accordingly, we respectfully submit that the appeal warrants plenary consideration by this Court.

Dated: New York, New York
August 3, 1981

Respectfully submitted,

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Appendix

STATE OF NEW YORK
COURT OF APPEALS

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1 No. 107
Jean Loretto, &c.,
Appellant,
v.
Teleprompter Manhattan CATV Corp., et al.,
Respondents.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

MEYER, J.

A statute which requires a landlord to allow installation of cable television[1] facilities upon his property for the use of his tenants or the tenants of other buildings or both is a valid exercise of the police power

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1. Hereafter "CATV".

rather than a taking requiring compensation, notwithstanding that the statute permits the payment by the cable television company for such installation of such amount as the State Commission on Cable Television[2] determines to be reasonable. The order of the Appellate Division should, therefore, be affirmed, with costs.

Plaintiff Loretto purchased the five-story apartment building known as 303 West 105th Street in New York City from Sharie Wald, taking title to the premises on February 28, 1972. In February 1976, plaintiff began this class action against Teleprompter Corporation and TelePrompter Manhattan CATV

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2. Hereafter "Commission".

Corp.[3] on behalf of a class consisting of all owners of real property in the State of New York on which Teleprompter "has placed any cable television component." As to her own property plaintiff alleged that TelePrompter had placed a CATV cable on the roof of the premises, attaching it by nails and other means, and had dropped a subcable down the front wall of the building to provide service to a first floor tenant. She asked for herself and each member of the class damages for the trespass and an injunction against its continuance. She specifically alleged that TelePrompter acted under the purported authority of Section 828 of the Execu-

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3. Hereafter collective referred to as "Teleprompter".

tive Law[4] and that its actions constituted a taking without just compensation and a deprivation of property without due process of law.

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4. That section which is entitled "Landlord-tenant relationship" provides:

"1. No landlord shall

a. interfere with the installation of cable television facilities upon his property or premises, except that a landlord may require:

i. that the installation of cable television facilities comform to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises, and the convenience and well-being of other tenants;

ii. that the cable television company or the tenant or a combination thereof bear the the entire cost of the installation, operation or removal of such facilities; and

iii. that the cable television company agree to indemnify the landlord for any damage caused by the installation, operation or removal of such facilities.

b. Demand or accept payment from any tenant, in any form, in exchange for permitting cable television service on or within

Fn 4 continued on next page.

Class action status was granted by an order which, as amended, constituted the class as plaintiff had requested but excepted from it owners of single family dwellings on which a CATV component servicing that dwelling exclu-

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Fn. 4 (continued)

his property or premises, or from any cable television company in exchange therefor in excess of any amount which the commission, shall, by regulation, determine to be reasonable; or

c. discriminate in rental charges, or otherwise, between tenants who receive cable television service and those who do not.

2. Rental agreements and leases executed prior to the effective date of this article may be enforced notwithstanding this section.

3. No cable television company may enter into any agreement with the owners, lessees or persons controlling or managing buildings served by a cable television, or do or permit any act, that would have the effect, directly or indirectly of diminishing or interfering with existing rights of any tenant or other occupant of such building to use or avail himself of master or individual antenna equipment."

sively had been placed.[5] The City of New York as franchisor of cable television companies within the City was granted leave to intervene and the Attorney General, pursuant to Section 71 of the Executive Law, appears in the action in support of constitutionality. During the examination before trial of plaintiff Loretto it appeared that she had in late 1976 or early 1977 transferred the property to Hargate Realty Corporation, a corporation wholly owned by her. The answers of both TelePrompter and the City raised the affirmative

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5. The giving of notice to the class was, however, adjourned until determination of the motion and cross-motion for summary judgment hereafter referred to. So far as revealed by the record before us, no notice has ever been given.

defense that plaintiff had failed to exhaust her administrative remedies in that she had not applied to the Commission under regulations adopted by it (9 NYCRR §598.2) for the fixation of a reasonable fee in excess of the one-time $1.00 payment fixed by the Commission in a Statement of General Policy as the normal fee to which landlord would generally be entitled.

TelePrompter moved for summary judgment dismissing the complaint, asserting that it had committed no trespass and that plaintiff had failed to exhaust her administrative remedies. The assertion that it had committed no trespass was grounded on both the legal argument that Executive Law, Section

828 is a valid exercise of the police power making permission unnecessary, and the factual contention that plaintiff Loretto's predecessor in title, Sharie Wald, had granted it an easement for installation of its facilities. TelePrompter also sought leave to renew its opposition to the class action determination. Plaintiff cross-moved for partial summary judgment determining that Section 828 is unconstitutional, that it did not in any event include crossover situations,[6] and that Tele-

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6. A crossover occurs when (1) the line servicing the tenants in a particular building is extended to adjacent or adjoining buildings, (2) an amplifier which is placed on a building is used to amplify signals to tenants in that building and in a neighboring building or buildings and (3) a line is placed on a building, none of the tenants of which are provided CATV service, for the purpose of providing

Fn 6 continued on next page.

Prompter was liable for trespass in noncrossover situations to damages of five percent of defendant's gross revenues from their premises. Prompted by the transfer of 303 West 105th Street to Hargate Realty, plaintiff Loretto also sought an order amending the class action order to include all persons who have or had title to affected premises at any time on or since January 1, 1973, the effective date of Section 828. Neilson Abeel, owner of 320 West 104th Street, on

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(Fn 6 continued)

service to an adjoining or adjacent building. Plaintiff did not seek summary judgment with respect to* crossover situations because she conceded that the five percent damage formula sought to be enforced does not apply to crossovers.

*[See Clerk's letter A100]

which TelePrompter had installed cable to service his tenants as well as those in neighboring buildings, moved at the same time (acting through the same attorney representing plaintiff) for leave to intervene on the ground that plaintiff Loretto's representation of the class might be inadequate.

Concluding that "the obvious public advantage sought to be served by the legislation under attack greatly outweighs the insignificant nature of the physical use of private property permitted by the statute" (98 Misc 2d 944, 945), Special Term granted summary judgment to Teleprompter and the City declaring Section 828 to be a valid exercise of the police power in both crossover and noncrossover situations, denied plaintiff Loretto's cross-motion

for partial summary judgment and denied as moot TelePrompter's motion to renew opposition to class action status, plaintiff Loretto's motion to amend the class action order to include former owners and proposed intervenor Abeel's motion for leave to intervene. The Appellate Division affirmed without opinion.

Plaintiff and the proposed intervenor appealed to our Court.[7] The

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7. The motion of the Attorney General and defendants to dismiss the appeal for want of a substantial constitutional question was denied (51 NY2d 1007). The motion did not raise any issue concerning Abeel's right to appeal from the Special Term order and judgment, but he clearly had no right to appeal from any part of Special Term's determination other than its denial of his intervention motion. For reasons hereafter stated we do not reach that question and, therefore, need not consider whether he was entitled to appeal to our Court from the Appellate Division's affirmance of the order denying leave to intervene, but see Cohen and Karger, Powers of the New York Court of Appeals, 193, 595.

briefs and oral argument present as issues for determination the standing of plaintiff Loretto to maintain the action; whether if she is without standing proposed intervenor Abeel may prosecute the appeal; whether the action is premature; whether Section 828 addresses both crossover and non-crossover situations; the constitutionality of the section; and if it is not constitutional whether class members are each entitled to damages in noncrossover situations of five percent of TelePrompter's gross revenue from the member's building. For the reasons hereafter stated we conclude that (1) plaintiff Loretto has standing to litigate the scope and constitutionality of Section 828, (2) the action is not premature, (3) Section 828 covers cross-

overs as well as non-crossovers and (4) the section is a valid exercise of the police power. In light of those conclusions, we need not consider the intervention and damage issues.

I

By agreement dated January 24, 1968, Sharie Wald, the then owner of 303 West 105th Street, for a flat fee of $50, granted TelePrompter permission to install a cable on the building and the exclusive privilege of furnishing CATV services to its occupants. The agreement was for a term of five years and from year to year thereafter unless either party gave the other written notice no later than 90 days prior to the end of a contract year. It also required Wald upon transfer of the building to notify the transferee of

the agreement and provided for termination by the transferee at any time within six months after the transfer, upon 90 days written notice to TelePrompter.

On June 1, 1970 TelePrompter installed a cable slightly less than one-half inch in diameter and of approximately 30 feet in length along the length of the building about 18" above the roof top, and directional taps, approximately 4" x 4" x 4", on the front and rear of the roof. By June 8, 1970 the cable had been extended another 4 to 6 feet and cable had been run from the directional taps to the adjoining building at 305 West 105th Street. Plaintiff Loretto testified at her deposition that she purchased the building in 1971 and took title on

February 28, 1972, that she was on the roof to inspect it prior to the closing of title and a number of times after the closing while a new roof was being installed, but that she never saw the cables until CATV service was provided to one of her tenants about two years after her purchase.

The Wald agreement was unrecorded and, therefore, would not bind plaintiff Loretto unless the installation was sufficiently open and visible to put her to inquiry and charge her with constructive notice of the agreement that inquiry would have revealed (Pallone v New York Telephone Company, 34 AD2d 1091, affd 30 NY2d 865; Historic Estates Inc. v United Paper Board Co., 260 App Div 349, affd 285 NY 658; see Butterworth v Crawford, 46 NY 349; 17

NY Jur 482, Easements & Licenses, §187; Ann: 74 ALR 1250). Transfer to plaintiff Loretto would, however, terminate the license, even though TelePrompter had no notice of the transfer (Restatement, 2d, Torts, §171, comment f), unless Loretto had (or was chargeable with) notice and took no steps to terminate the license (id, comment g). The factual issues concerning visibility of the TelePrompter equipment and whether the transfer to Loretto (or her bringing of the present action) terminated the Wald agreement bear upon whether Loretto can recover for trespass occurring before the action was begun, but do not affect her right to maintain the cause of action for declaratory judgment concerning the scope of and constitutionality of Section

828, for that section, if applicable and valid, prevented her interference with the CATV facilities on her premises from and after the effective date (January 1, 1973) of the section. That she had notice of the Wald agreement, if she did, would not prevent her termination of it, if the statute did not. That she was not bound by the Wald agreement would not permit her to recover in trespass on the ground that the transfer to her terminated the license, if TelePrompter obtained a similar license through enactment of the statute. There was, therefore, a justiciable controversy which plaintiff Loretto had standing to maintain (cf. Berenson v Town of New Castle, 38 NY2d 102, 107, n 1; Golden v Planning Board of Ramapo, 30 NY2d 359, 366, app dismd 409 US 1003; see also Andrus v Allard,

444 US 51, 64, n 21).

Nor did her transfer of the premises to Hargate cause the action to abate. Not only was she as the sole stockholder of the corporation the real party in interest, but also the transfer occured after the action was brought. CPLR 1018 expressly provides that "Upon any transfer of interest, the action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action," and was applied in Udell v Haas (20 NY2d 862) to just such a situation as the present. In light of the express legislative policy against abatement of actions (2 Weinstein-Korn-Miller, NY Civ Prac, ¶1023.03) and the procedural

flexibility intentionally built into the CPLR's class action provisions (see CPLR 907 and 2 Weinstein-Korn-Miller, op cit, ¶907.07), we have no hesitancy in holding that plaintiff Loretto may continue the action notwithstanding the transfer to Hargate.[8]

II

Defendants point to the provision of subdivision (1)(b) of Section 828 prohibiting a landlord from demanding or accepting payment from any cable television company in exchange for permitting cable television service "in

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8. CPLR 1003 and 1021 would permit our joining Hargate as a party to the action, even at this stage, but we perceive no immediate reason for doing so and consider it best to leave that question to determination by Special Term should any party believe it advantageous or necessary to make a motion permitting or requiring such joinder (see Udell v Haas, supra).

excess of any amount which the commission shall, by regulation, determine to be reasonable" and to the provisions of Part 598 of the Commission's Rules and Regulations which authorize an application to the Commission for the fixation of a fee in excess of the $1.00 fee which by its Statement of General Policy the Commission has stated is the nominal fee to which, generally, a landlord will be entitled, and argue that no action will lie until application has first been made to the Commission for the fixation of a fee.[9]

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9. The argument excepts so much of the action as seeks to recover for crossovers, which defendants concede are not within Section 828 (subd [1][b]). On the latter point, see Section III, infra, If correct that concession would, however, raise a question concerning the adequacy of the available administrative

Fn 9 continued on next page.

The argument might have validity were Section 828 (subd [1][b]) a clear joint exercise of the power of eminent domain and the police power, for then the provision for compensation under the eminent domain power might moot any question of the reasonableness of the exercise of the police power (Compare In Re Kansas City Ordinance No. 39946, 298 Mo 568, and Pera v Shorewood, 176 Wis 261, with City of Kansas City v Kindle, 446 SW2d 807 [Mo]; and see Bosselman, Callies & Banta, The Taking Issue pp 302 ff and Ann: 41 ALR3d 636).

(Fn 9 continued).

review (see Ulmer Park Realty Co. v City of New York, 267 App. Div. 291, 294, app den 267 App Div 879; Matter of Cherry v Brumbaugh, 255 App Div 880, ALI Model Land Development Code [P.O.D.], p 498).

Not every exercise of the police power that includes a provision relating to compensation is an exercise of the power of eminent domain, however, or constitutes a taking (see French Investing Co. v City of New York, 39 NY2d 587, app dismd and cert den 429 US 990).

CATV companies such as Tele-Prompter are incorporated under the Transportation Corporation Law (see Hoffman v Capitol Cablevision Systems, 82 Misc 2d 986, affd 52 AD2d 313; Harper v City of Kingston, 17 Misc 2d 627; 1952 Op Atty Gen 166), and Section 27 of that law includes express provisions for compensation "ascertained in the manner provided in the eminent domain procedure law" when lines are run upon, through or over privately owned land.

The fact that Section 828 (subd [1][b]) of the Executive Law makes no reference to the Transportation Corporation Law provision and, more importantly, the fact that the subdivision imposes an upper limit upon the amount that may be demanded or accepted by a landlord from a cable television company rather than a requirement that such a company pay compensation to a land owner (as does Section 27 of the Transportation Corporation Law) leads us to conclude that the Legislature in enacting Article 29 of the Executive Law, in which Section 828 is contained, intended to act under the police power only (cf. Environmental Conservation Law, Section

24-075 [subd 7]).[10]

In any event, what plaintiff seeks is a determination that because the section grants a statutory license to the CATV company holding the franchise for her area to attach its equipment to her property it is a facially invalid exercise of the police power and if construed to be an exercise of the power of eminent domain, in that aspect as well.[11] As has long been

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10. Comparable statutes in Connecticut (Conn Stats Ann, Tit 16, §16-333[a]) and Massachusetts (Mass Gen Laws Ann, Ch 166 A, §22), either proscribe any payment to an owner of a multi-unit residential building or simply imply the owner's consent from delivery to him of a copy of the statute and a statement, signed by the CATV company, agreeing to be bound by it.

11. The grounds urged for the latter contention are that the section provides for determination of compensation by regulation rather than judicial decision, fails to provide for payment in

Fn 11 continued on next page.

recognized, administrative remedies provide by a statute need not be exhausted prior to the bring of an action which challenges the enactment "in its entirety" as unconstitutional (Golden v Planning Poard of Ramapo, 30 NY2d 359, 365, supra; Accord: Euclid v Ambler Co., 272 US 365, 386; Watergate v Buffalo Sewer, 46 NY2d 52; Matter of Grimpel Assoc. v Cohalan, 41 NY2d 431; Scarsdale Supply Co. v Village of Scarsdale, 8 NY2d 325). Manhattan Cable Television Inc. v Uris 55 Water

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(Fn 11 continued).

advance of taking or security for such payment though the taking be by a private company, and leaves the determination of compensation to an administrative body the budget of which is funded almost entirely by assessments against the gross receipts of the companies that are parties to such determinations.

Street Company (NYLJ 6/14/77, p 5, col 5), upon which defendants rely, is distinguishable because the party raising the question of constitutionality in that case conceded the facial validity of Section 828 and challenged only the section as applied in determining its compensation, while plaintiff in this case makes no such concession.

III

Plaintiff's argument that cross-overs are not within the scope of Section 828 is predicated upon the use of the words "landlord" and "tenant" or "tenants" in the section and the reference to "services" in subdivision (1)(b). Ignoring the use of the word "facilities", she concludes that the entire section deals only with tenant service situations. While there is

some support for her view in parts of the legislative history and in dictionary definitions of the words "landlord" and "tenant", we conclude, in light of the declaration of legislative intent contained in Article 28, the language of Section 828 considered in its entirety, the use in subparagraph (a) of the section of the word "facilities", and parts of the legislative history, that the Legislature intended to proscribe interference by any owner of rental property with the installation of CATV facilities on his property whether used to furnish service to the tenant or tenants of the property on which installed or of another property or properties or both, but to permit such an owner to demand payment only from the CATV company

making the installation and only for the service extended to tenants of his own property.

As we noted in City of New York v State of New York Commission on Cable Television (47 NY2d 89, 92-93), the Commission "is invested with broad authority to oversee the burgeoning cable television industry" and is "endowed with broad powers to regulate in the public interest," which should not be inhibited" by unduly emphasizing a particular portion of the enabling act, of somewhat doubtful implication, at the expense of the whole." The public interests sought to be furthered by Article 28 are identified in Section 811, which recites that after "investigation of the public interest associated with cable television" the Legisla-

ture has determined that CATV operations involve "vital business and community services" which "must be protected from undue restraint and regulation so as to assure cable systems with optimum technology and maximum penetration * * * as rapidly as economically and technically feasible," that "the state would benefit from valuable education and public services through cable television systems," that a state agency is needed, therefore, "to promote the rapid development of the cable television industry" and "assure that cable television companies provide adequate, economical and efficient service to their subscribers," and that the Legislature intends to vest in that agency authority "to stimulate the development of diverse instructional,

educational, community interest and public affairs programming."

Against the background of that declaration of intention, the provisions of Section 828 are to be measured. While the word "landlord" is normally used to refer to a property owner in relation to his own tenant or tenants, it can also be understood in a sentence beginning "No landlord shall" as referring to landlords as a class, without reference to a particular tenurial relationship. The sense in which it is used in any given situation depends upon the context. Here the opening clause of subparagraph (a)[12] is wholly consistent with the second rather than

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12. The wording of that clause is "interfere with the installation of cable television facilities upon his property or premises".

the first sense of the word "landlord". The fact that subclauses (i) and (ii) of subparagraph (a) speak to the situation of tenants of a particular landlord[13] does not require a contrary conclusion, because they state the exceptional situations in which "a landlord" is permitted to impose conditions in relation to his own tenants. Consistent also with the generic rather than the particular use of the word "landlord" is the report of Commissioner William K. Jones of the Public Service Commission, prepared at the request of former Governor Rockefeller, entitled Regulation of Cable Television

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13. In earlier versions subclause (iii) also included the words "the tenant". (A7809/1971, §157, S9823/1972, §828).

by the State of New York,[14] and the testimony of Joseph C. Swidler, Chairman of the Public Service Commission, before the Joint Legislative Committee considering the CATV bill. The report recognized that "landlord impediment to the extension of CATV service is disadvantageous not only to the personal interest of tenants, but to development of the CATV industry" (pp 206-207) and that the

> "***proposal involves some intrusion upon the property interest of the landlord. But the interest intruded upon is a wholly abstract one -- given the conditions specified, the landlord's interest consists entirely of insisting that some negligible unoccupied space remain

14. See the Governor's Message on approval of chapters 466 and 467 of the Laws of 1972, 1972 McKinney's Session Laws, p 3395.

> unoccupied. The tenant's interest clearly is more substantial, consisting of a right to receive (and perhaps send) communications from and to the outside world. In the electronic age, the landlord should not be able to preclude a tenant from obtaining CATV service (or to exact a surcharge for allowing the service) any more than he could preclude a tenant from receiving mail or telegrams directed to him" (p 207) (emphasis supplied).

And Chairman Swidler, testifying with respect to Section 157 of A7809/1971, stated:

> "As you may know, landlords in many instances have imposed extremely onerous fees and conditions on cable access to their buildings. Clearly, landlords should be allowed to impose conditions governing the safety and appearance of their property and to bear the full cost of installation and indemnification for damage. Legislation is necessary, however, to prohibit gouging and arbitrary action." (Emphasis supplied.)

As proposed in the Jones Report, as introduced and as first passed by

the Legislature,[15] Article 28 proscribed all payments to a landlord by anyone in any form for permitting CATV service on his property. At the same legislative session, however, subdivision (b) of Section 828 was amended by Chapter 467 to proscribe any payment by a tenant to a landlord for service, but to permit the landlord to accept from a CATV company a payment not greater than an amount which the Commission by regulation determined to be reasonable. No legislative history for the change has been presented or found. To be noted, however, are the minimal additional[16] intrusion of a crossover

15. Laws 1972, chapter 466.

16. The crossover extension of the Loretto property is but 4 to 6 feet of cable in addition to the intrusion for tenant service which, accordingly to the Jones Report, is only upon "negligible unoccupied space."

extension, the legislative purpose to "assure * * * maximum penetration" and "promote the rapid development of the * * * industry" and the public benefit the Legislature found to be involved in so doing, the testimony before the legislative committee that "landlords in many instances have imposed extremely onerous fees * * * on cable access to their buildings," and the obvious difficulty of measuring the value of a crossover installation considering that such an installation is but a link in a chain that could encompass all properties in a square block. Bearing those considerations in mind, we find it improbable in the extreme that the Legislature intended to leave completely open the possiblity of property owners obtaining "onerous fees" for the cross-

over portion of an installation, while at the same time providing a method[17] of limiting the amount a property owner could demand from a CATV company for allowing tenant service. More logical, in our opinion, because more consistent with the legislative plan, is the conclusion that the Legislature intended to proscribe interference with access for installation of facilities on the property for whatever purpose without any provision for payment, permitting payment only in relation to tenant service and then only within the limits fixed by the Commission. That there may at the time of an original instal-

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17. The method provided is similar to that which prevailed under New York City Rent Control, which allowed a $2.00 monthly surcharge by a landlord to those of his tenants having CATV service.

lation of facilities be no tenant in that property receiving service does not militate against that conclusion, for the Legislature may properly have determined that no payment need be made, even in that situation, in view of the "negligible unoccupied space" taken up by the installation and the fact that once CATV facilities have come to a block tenants in the building may be expected to seek service.[18]

18. Not only does that conclusion further the legislative policies concerning the educational and communications value of cable television declared in Executive Law, Section 811, but also it is supported by the inclusion in the exemptions from execution declared by CPLR 5205 (subd [a], par [5]) of "one television set", by which the Legislature has explicitly recognized television as a practical necessity of modern living. That factor plus the modern view of the police power which includes as a basis for its exercise aesthetics (Suffolk Outdoor Advertising v Hulse, 43 NY2d 483, app dismd 439 US 808; Modjeska Sign Studios v Berle, 43 NY2d 468, app. dismd. 439 US 809; People v Goodman, 31 NY2d 262) furnish a valid ground for differentiating television, including cable television, from other private industry.

IV

That, as stated in Part II above, the Legislature imposed no requirement for compensation makes unnecessary our consideration of many of the eminent domain arguments advanced by plaintiff. There remain, however, questions concerning whether Section 828 constitutes proper police power action and whether if it does its interference with plaintiff's property so far constitutes a "taking" as to invalidate it nonetheless.

A.

What is permissible under the police power varies with economic and social conditions. As the California Supreme court put it more than half a century ago in Miller v Board of Public Works (195 Cal 477, 484-485), the power

is "elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life, and thereby keep pace with the social, economic, moral, and intellectual evolution of the human race." The flexibility of the power and its availability not only in the interest of public health, safety and morals but also as a means of promoting the moral, intellectual and spiritual needs of our citizens, as well as public convenience and general prosperity, has been recounted in numerous decisions of this Court and of the Supreme Court (Salamar Builders Corp. v Tuttle, 29 NY2d 221, 227; Nettleton Co. v Diamond, 27 NY2d 182, 192-193, rearg den 28 NY2d 539,

app dismd 401 US 969; Matter of Wulfsohn v Burden, 241 NY 288, 298-299; People ex rel Durham Realty Corp. v La Fetra, 230 NY 429, 446-447, app dismd 257 US 665; Euclid v Ambler Co., 272 US 365, 387; Block v Hirsh, 256 US 135, 155).

Here the purpose sought to be achieved, as stated by the Legislature (Section 811), is rapid development of and maximum penetration by a means of communication which has important educational and community aspects. This is a legitimate purpose for use of the police power. Moreover, the provisions of Section 828 are reasonably and substantially related to that purpose, bearing in mind the "onerous fees and conditions" imposed by landlords to

which Chairman Swidler testified (supra, p 13) and the reasonable inference that, in part at least, development of the CATV industry and system, which at the time of the adoption of Article 28 was more than 20 years old (see 1952 Op Atty Gen 166), had been inhibited by such fees and conditions. Nor should it be lost sight of that the particular section in question is directly addressed to so much of the landlord-tenant relationship as is involved in development of the industry. Regulation of that relationship is a separately recognized police power purpose (People ex rel Durham Realty Corp. v La Fetra, supra; Block v Hirsh, supra), and the economics of that relationship, whether in-

volving rent directly charged to the tenant or an indirect cable installation cost charged to the CATV company making the installation and by it passed on to the tenant, bears a substantial relation to that purpose. Whether considered as to the first or the second purpose referred to above or as to both, Section 828 is within proper police power bounds.

Once it has been found that the Legislature has acted on a subject within its powers and in a manner related to the intended end, it is irrelevent either that other or alternative means of achieving the same end are available (PruneYard Shopping Center v Robins, 447 US 74, 85, n 8; People v Griswold, 213 NY 92, 97) or that one of the effects of the enactment may be to

benefit private as well as public interests (Block v Hirsh, supra at p 155; see Noble State Bank v Haskell, 219 US 104, 110 and 580).

B.

As we have had occasion previously to note, there is no "bright-line standard for differentiating permissible police power measures from overly vigorous and hence unconstitutional impositions" (Spears v Berle, 48 NY2d 254, 262). Rather "the facts of each case must be evaluated in order to determine the private and social balance of convenience" French Investing Co. v City of New York, 39 NY2d 587, 596, supra) and the "[r]esolution of each case * * * ultimately calls as much for the exercise of judgment as for the application of logic" (Andrus v Al-

lard, 444 US 51, 65). Factors of significance in such an inquiry are "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations" (PruneYard Shopping Center v Robins, at pp 74, 83, supra).

1.

The effect of the character in which government acts was articulated in Lutheran Church v City of New York (35 NY2d 121, 128-129) and restated in French Investing Co. v City of New York (supra at p 593) as follows:

> "[G]overnment interference [with the use of private property] is based on one of two concepts -- either the government is acting in its enterprise capacity, where it takes unto itself private resources in use for the common good, or in its arbitral capacity, where it intervenes to straighten out situations in

> which the citizenry is in conflict over land use or where one person's use of his land is injurious to others. (Sax, Taking and the Police Power, 74 Yale L. J. 36, 62, 63.) Where government acts in its enterprise capacity, as where it takes land to widen a road, there is a compensable taking. Where government acts in its arbitral capacity, as where it legislates zoning or provides the machinery to enjoin noxious use, there is simply noncompensable regulation."

Here, the State has acted not in furtherance of any governmental program normally carried on by government (such as the aircraft flights involved in United States v Causby, 328 US 256). Rather it seeks in the interest of education and the development of an additional system of communciation to adjust "the benefits and burdens of economic life to promote the common good" (Penn Central Transp. Co. v New York City, 438 US 104, 124, reh den

439 US 883). It acts as arbiter not as entrepreneur.

But, argues plaintiff, there is here a physical invasion of the property which, whether by government or an entity or person authorized by government, necessarily constitutes a taking. The simple answer is that the cases do not bear out the argument.

New York Telephone Company v Town of North Hempstead (41 NY2d 691), on which plaintiff heavily relies, is not in point because there the Town, by enacting an ordinance granting itself the right to affix street lighting fixtures to the Company's poles, invaded the Company's property for a governmental purpose (see 41 NY2d at p 697). As the Supreme Court noted in Penn Central Transp. Co. v New York City (438 US at

p 124, supra), "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government" (emphasis supplied).[19]

There are, moreover, numerous situations in which conceded invasions of private property authorized by government in the community interest but not directly for a governmental entreprenurial purpose have been upheld as valid exercises of the police power.

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19. Though the invasion in North Hempstead was more than minimal, not every entreprenurial invasion by government is a taking. See United States v Causby (328 US 256, 265-266), where after pointing out that there was "a direct invasion of respondents' domain" the court quoted from United States v Cress (243 US 316, 328) "* * * it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is taking" (emphasis supplied).

The most recent is PruneYard Shopping Center v Robins (447 US 74), already several times referred to. There the Supreme Court dealt with the California Supreme Court's interpretation of the state constitution as requiring that a shopping center owner permit solicitation of petition signatures in an orderly fashion in the common areas of the shopping center. Distinguishing its own earlier decisions holding that the First Amendment encompassed no such right, and characterizing the state constitutional provision as interpreted as the same as a statute enacted under the police power, the court held that notwithstanding that the common law right to exclude others was "one of the essential sticks in the bundle of property rights," the fact that the peti-

tion solicitors had "physically invaded" the shopping center was not determinative,[20] and that the state court decision did not violate the due process property rights of the owner of the center. In a separate part of the opinion it considered not the First Amendment rights of the petition solicitors but the First Amendment rights of the shopping center owner, and held that forcing him to permit use of his property as a forum for speech by others did not violate the owner's federal free speech rights.

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20. Contrast Kaiser Aetna v United States (444 US 164, 179-180), where invasion of the same right to exclude was held to constitute a taking because as the court later explained in Prune-Yard (447 US at p 84) "The Government's attempt to create a public right of access to the improved pond interfered with Kaiser Aetna's 'reasonable investment backed expectations.'"

Additional examples are not wanting. No less an invasion of the right to exclude than that of which plaintiff complains was involved in People ex rel Durham Realty Corp. v La Fetra (230 NY 429, app dismd 257 US 665) and People ex rel Rayland Realty Co. v Fagan, 194 App Div 185, affd 230 NY 653), both of which upheld a statute suspending for two years a landlord's right to oust his tenant upon termination of the lease. Though in La Fetra we recognized that "The free choice of tenants; the unlimited right to bargain; these are property rights which may not be affected unless a public advantage over and beyond such rights justifies legislative interference" (p 443), we held the taking analogous to the abatement of a nuisance and within the police

power because "What is taken is the right to use one's property oppressively and it is the destruction of that right that is contemplated and not the transfer thereof to public use."

Physical invasion closely analogous to that in the present case was involved in Jackman v Rosenbaum Co. (263 Pa 158, affd 260 US 22). In that case the Supreme Court of Pennsylvania affirmed entry of judgment for defendant notwithstanding the jury's $25,000 verdict for plaintiff in a trespass action, where the trespass was in demolishing, in order to build a new party wall between plaintiff's theatre building and defendant's, the wall of plaintiff's building in consequence of which for a substantial period of time plaintiff's theatre could not be used.

It did so on the ground that defendant's entry on plaintiff's land was not a trespass because in entering plaintiff's land defendant "exercised merely a lawful right conferred upon him by valid police statute" which protected against the dangers of fire and contributed to the common economical management of adjoining properties (263 Pa at p 172).[21] Substantially earlier party wall precedent is to be found in the English customary law which in 1189 required that neighbors give one and half feet of land each in order to construct a three foot party wall (Bossel-

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21. The United States Supreme Court, affirming, did not reach the constitutional question because it found that the custom of party walls was introduced by the first settlers and that a statute embodying that understanding did not need to invoke the police power.

man, Callies and Banta, The Taking Issue, 62).

Not as closely in point but relevant to the present holding are Noble State Bank v Haskell (219 US 104), upholding an assessment against all banks to guaranty repayment to depositors in any bank, notwithstanding the "invasion" of the bank's treasury thus mandated, and cases upholding subdivision dedication requirements, such as our decision in Jenad, Inc. v Village of Scarsdale (18 NY2d 78) and that of the California Supreme Court in Ayres v City Council of the City of Los Angeles (34 Cal 2d 31). Finally, it is not without significance that Professor Sax considered it an "important point" that "the presence or absence of a formal title-acquisition and/or invasion will

never be conclusive" (74 Yale LJ at p 67, emphasis supplied) and conceded that "one may be required to tolerate a physical invasion of the surface [of his land] without being constitutionally entitled to compensation" (81 Yale LJ at p 163).

2.

Concerning economic impact, Mr. Justice Holmes, with characteristic colorfulness, spoke of the "petty larceny of the police power"[22] and wrote a number of decisions in the same vein.[23] That there are difficulties in applying a test with so fluid a concept as di-

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22. 1 Holmes-Laski Letters (Howe Ed 1953) 475, explaining that at the request of his colleagues he had deleted the phrase from his opinion in Jackman v Rosenbaum Co. (260 US 22).

23. The decisions are reviewed in Bosselman, Callies and Banta, The Taking Issue, chapter 8.

minution of value is clear from scholarly analysis in the field.[24] Whatever the difficulties, the case law establishes that degree of loss remains a factor which will invalidate a regulation when all but a bare residue of value is lost as a result of the regulation (French Investing Co. v City of New York, 39 NY2d 587, 596, supra; Lutheran Church v City of New York, 35 NY2d 121, 132) but not when the regulation does not "unreasonably impair the value or use" of the property (Prune-Yard Shopping Center v Robins, 447 US

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24. Id. pp 208-210; Sax, Takings and the Police Power, 74 Yale LJ 36, 44-46, 50-50*; Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv LR 1165, 1190-1193; Van Alstyne, Modernizing Inverse Condemnation: A Legislative Prospectus, 8 Santa Clara Lawyer, 1, 16-17.

*[See Clerk's letter A100]

at p 83, supra; see also Agins v City of Tiburon, 447 US 255) or does not interfere with the "privacy expectation concerning the use of" the property (Penn Central Transp. Co. v New York City, 483 US at p 136 supra), when there is a reasonable return on the property available to its owner even though without the regulation the value of the property would have been many times greater (Penn Central Transp. Co. v City of New York, 42 NY2d 324, Modjeska Sign v Berle, 43 NY2d 468, app dismd 439 US 809) or when "the resulting loss to the owner is relatively slight and insubstantial" (People v Miller, 304 NY 105, 108; see Kaiser Aetna v United States, 444 US 164, 180) or "comparatively insignificant" (Noble State Bank v Haskell, 219 US 104, 110).

Here plaintiff Loretto makes no claim that she is not receiving a fair return from the property. What she is saying is that an area of the building for which she does not claim to have any other use may not be used for the benefit of her tenants because without the statute she would be able to obtain a fee from the CATV company, payable in last analysis by the tenant, for failing to exercise her common law right to exclude the CATV company from her property. But, as the Supreme Court held in Andrus v Allard (444 US 51, 65-66), "the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because

the aggregate must be viewed in its entirety." Both judgment and logic dictate the conclusion that viewed against the aggregate of plaintiff's property rights the economic impact of the statute is insufficient to invalidate it.

3.

The situation is no different when we consider interference with reasonable investment-backed expectations. The meaning of that somewhat esoteric phrase becomes clear if we contrast Kaiser Aetna v United States, supra, in which the Supreme Court found such interference, with PruneYard Shopping Center v Robins, supra, in which it did not. Kaiser Aetna leased a 6,000-acre area on the island of Oahu for subdivision development. The area

included Kuapa Pond, a 523-acre private pond extending approximately two miles inland from the Pacific Ocean and separated from it by a barrier beach. Having created a marina-style community of some 22,000 persons around Kuapa Pond, including approximately 1,500 marina waterfront lot lessees who paid a regular annual fee of $72 for maintenance of the pond, Kaiser Aetna with the acquiescence of the United States Corps of Engineers dredged a deeper channel and increased the clearance under a highway bridge only to be told that by so doing they had subjected the pond to a navigational servitude and were precluded from denying the public access to it. Noting that Kaiser Aetna had invested substantial amounts of money in making improvements, the

Supreme Court held that the right to exclude others from the pond had been physically invaded by the government's imposition of a navigational servitude and that that could be done only by invoking the power of eminent domain. In PruneYard, on the other hand, the Supreme Court upheld a state constitutional provision which entitled citizens to exercise petition rights on the property of a shopping center notwithstanding the center's efforts to exclude the persons soliciting signatures. Referring to the substantial sums that had been invested by the developer in Kaiser Aetna, the Supreme Court held (447 US at p 84) that in PruneYard "appellants have failed to demonstrate that the 'right to exclude others' is so essential to the use or

economic value of their property that the state-authorized limitation of it amounted to a 'taking'."

From those cases it is fair to conclude that the phrase "reasonable investment-backed expectations" refers not to the overall investment in the property, but to investment made with a now frustrated particular purpose or "expectation" in mind. Thus, in Kaiser Aetna there was investment in the improvement of the pond in the expectation that it would be open only to fee-paying members; in PruneYard no investment-backed expectation was found.[25]

25. Consistent with this interpretation of the phrase is the Supreme Court's use of it in Penn Central Transp. Co. v City of New York (438 US at p 127, supra) to describe its earlier holding in Pennsylvania Coal Co. v Mahon (260 US 393). In Mahon the court invalidated a statute for-

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Here, as in PruneYard, there is no showing of any investment made in the expectation that fees would be derived from CATV installations separate and apart from the rent normally paid by the tenant. Such income as plaintiff and other property owners derived from CATV installations prior to enactment of Section 828 arose not from any investment-backed expectation but from the combination of the owner's common law right of exclusion and the desire of tenants generally to avail themselves of CATV service, which infused

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(Fn 25 continued)

bidding the mining of coal that would cause subsidence of any house, noting that the coal company had sold the surface rights to the land in question but expressly reserved the right to remove the coal and the statute would destroy this "expectation".

value into what had previously been, as Commissioner Jones characterized it, "negligible unoccupied space."

Tested against the Supreme Court's factual inquiry criteria, Section 828 is a valid police power exercise and not a taking.

V

The dissent's insistence that there has been a taking is based upon a number of misconceptions.

First, the PruneYard case cannot be dismissed as a First Amendment case (dissent, footnote 2), for the only First Amendment question considered by the Supreme Court was whether the shopping center owner's federal constitutional rights were violated by the holding of the California Supreme Court that the free speech provision of the

state constitution required the owner to permit use of his property as a forum for the speech of others. By a divided court it held that it did not. The court was, however, unanimous in its holding that the fact that the petition solicitors had "physically invaded" the owner's propery did not constitute a taking of property without just compensation. PruneYard is, therefore, on all fours with the instant case and, moreover, strongly suggests that Delaware, Lackawanna and Western Railroad Company v Town of Morristown (276 US 182), upon which the dissent relies (dissent, p 8), would not be followed by the Supreme Court were it again presented with the same situation. Pumpelly v Green Bay Company (13 Wall [80 US] 166) likewise

does not support the dissent's thesis, for the ultimate holding of Pumpelly was (p 181) "that where real estate is actually invaded * * * by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking" (emphasis supplied). Here, as in Part IV(B)(2) above we have taken pains to point out, there is neither destruction nor impairment of usefulness[26] and physical

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26. City of Albany v State (28 NY2d 352 and Heyert v Orange & Rockland County (17 NY2d 352), cited at page 6 of the dissent, are not to the contrary. In both we held that whether what was taken had only nominal value was beyond our jurisdiction to consider (17 NY2d at p 364, 28 NY2d at p 360) and in Heyert we noted further that the easement was "in essense a partial taking which, in many ways may cause only nominal damage but in some instances may result in serious consequential damage to the adjacent land" (17 NY2d at p 364, emphasis supplied).

invasion alone is not enough.[27]

Secondly, the rent control cases (La Fetra and Fagan) which the dissent in its footnote 2 seeks to distinguish are likewise in point. Those cases were not cited for the proposition that property can be taken for public use without compensation, but for their relevance to the "physical invasion" argument. The distinction between regu-

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27. While relying on Professor Sax in one respect (dissent, footnote 1), the dissent quotes Professor Michelman (dissent, p 6) on physical invasion and ignores Professor Sax' view that physical invation "will never be conclusive" (stated in both of his articles and quoted above [slip, p 21] [A53-A54]). What it overlooks is that what Professor Michelman is discussing (as the quotation in the dissent shows) is "when the government deliberately brings it about that its agent, or the public at large, 'regularly' use, or 'permanently' occupy, space" (p 1184, emphasis supplied), and that section of Michelman's article referred to discusses "when government makes regular or permanent use of thing" (p 1186).

lation and appropriation which the dissent seeks to draw in that footnote and in its discussion of "the traditional public appropriation category" (slip, p 6) is simply inapplicable. The statute presently under consideration is not a "public appropriation" any more than was the rent control provision considered in La Petra and Fagan. To call a provision which says a landlord may not put a tenant already on his property off a regulation, but characterize as a public appropriation a statute which says that a landlord must in the interest of his tenant let someone put something on the landlord's property, is to ignore the reality that the physical and economic effects on the landlord in the two situations are identical. Nor does the passing refer-

ence in La Fetra to compensation distinguish the cases, for plaintiff Loretto (or the successor company) is likewise entitled to reasonable apartment rent from the tenants of 303 West 105th Street and, it may be surmised, gives up a great deal less (5% of the Cable TV company's fee, according to plaintiffs) than did the landlord in La Fetra (the difference in rent obtainable with and without controls in the housing crisis of a war emergency economy).

Finally, in stating that there is no reason for foreclosing fair compensation here (dissent, p 8) and that the majority offers no rationale for its distinction between cable TV companies and telephone companies or other utilities (p 7), the dissent misconceives

the thrust of this opinion. What it holds is that the State may proscribe a trespass action by landlords generally against a cable TV company which places a cable and other fixtures on the roof of any landlord's building, in order to protect the right of the tenants of rental property, who will ultimately have to pay any charge a landlord is permitted to collect from the cable TV company, to obtain cable TV service in their respective apartments. The bases upon which the Legislature may do so are its power to regulate landlord-tenant relationships and its power to encourage development of an educational and communications medium. Doing so, the State takes nothing for itself as entrepreneur and acts well within its

police power.[28]

The distinction between cable TV companies and telephone and telegraph companies is in the legislation under which they function. A company of the latter sort is authorized to "construct and maintain its stations, plants, equipment or lines, upon, through or over any other land, subject to the right of the owners thereof to full compensation for the same" (Transportation Corporation Law, §27), and the owners' rights to compensation are further protected by Real Property Law,

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28. The dissent fails to recognize the legislative restriction of Section 828 to rental properties and the part that restriction plays in our holding, as is shown by its suggestion (dissent, p 7) that the concept of this opinion would permit telephone companies to place poles across a person's front yard without compensation.

§§ 261 and 335-a. The statute now under consideration (Executive Law, §828) provides to the contrary that no owner of rental property may demand or accept any payment from a cable TV company "in excess of any amount which the commission shall, by regulation, determine to be reasonable." That language in fixing a maximum amount and using the word "any" clearly contemplates that no amount may be payable to a landlord by a cable TV company. That fact and the fact that, as noted in Part II above, the Executive Law provision makes no reference to the Transportation Corporation Law's requirement of compensation furnish a clear rationale (the differing legislative purposes and intents) for treating cable TV companies differently from telephone

and telegraph companies.

VI

What creates the need for installation of CATV facilities on rental properties is the desire for such facilities by the inhabitants of the properties. As part of its regulation of the rights of tenants and landlords and in furtherance of the development of CATV as a communications and educational medium, the Legislature may proscribe the landlords' exaction of any charge over the regular rent for CATV service, whether that charge be imposed directly against the tenant or indirectly by requiring payment of it by the CATV company which will in turn impose it upon the tenant. Neither the physical invasion of the landlord's

property by the attachment of such facilities nor the fact that at the time the facilities are attached to a building no tenant of that building is a CATV subscriber invalidate the legislative exercise of the police power, in view of the minimal nature of the invasion and the absence of any reasonable expectation on the part of the landlord that the space thus utilized (or invaded) would ever be income productive.

In sum, this simply is not, as the dissent would have it, a "traditional public appropriation case." Accordingly, the order of the Appellate Division should be affirmed, with costs.

GARRIELLI, J. (concurring):

I agree with the analysis of the taking issue expressed in the dissenting opinion insofar as it concludes

that the state-authorized appropriation of a landlord's property for the benefit of cable television companies is a taking requiring compensation, but I nevertheless concur in the result reached by the majority since I believe that the current legislative framework provides an adequate system to ensure that just compensation will be afforded for any taking which actually occurs.

Subdivision 1(b) of section 828 of the Executive Law provides that a landlord may not accept payment from any cable television company in exchange for permitting cable television service on or within his property in excess of any amount which the State Commission on Cable Television shall, by regulation, determine to be reasonable. The regulations of the Commis-

sion then provide that a landlord shall be entitled to the payment of a reasonable fee, pursuant to this section, upon Commission approval of an application for such a fee (9 NYCRR § 598.2). While the Commission had decided, as a matter of policy, that the compensation due to a landlord who complains of the mere placement of a cable across his rooftop, without more, shall be limited to the nominal sum of one dollar, it is obvious that a landlord who actually incurs damage to his property or is restricted in the use to which he might put that property will receive compensation commensurate with the greater injury. This, if the installation of a cable substantially interferes with the owner's present or future use of the building, we must presume that the Com-

mission would award reasonable compensation for the taking pursuant to its regulations.

Accordingly, I would affirm the order of the Appellate Division, but I would do so upon the ground that legislation has supplied a mechanism for providing just compensation for any taking which actually occurs.

COOKE, Ch. J. (dissenting):

The legislation involved here is not a valid exercise of the police power. Rather, it authorizes an unconstitutional taking of plaintiff's property without just compensation. Although the concepts of a "taking" and the exercise of the State's police power are related and sometimes intertwined, they are distinguishable. By its decision today, the court unneces-

sarily muddies the distinction between the two concepts and eliminates an important protection against unfair invasions of private property. A dissent therefore is in order.

Plaintiff, who owned an apartment building, alleges that TelePrompter ran a television cable across the roof of the building, placed other equipment on the roof and dropped another cable down the front of the five-story brownstone to provide service to a first-floor tenant. In 1972, the Legislature enacted section 828 of the Executive Law, barring any landlord from interfering with the installation of cable television facilities on their premises and from demanding any compensation for permitting installation and service other than that set by the State Com-

mission on Cable Television. The Commission has established $1 as the general fee to which all landlords will be entitled.

The majority concludes that the imposition upon landlords constitutes a valid exercise of the State's police power because it furthers development of cable television "as a communications and educational medium" and regulates the tenant-landlord relationship. In addition, the majority cites the "minimal nature" of the physical invasion of the landlord's properties (slip opn, p 28). If this case involved merely a <u>limitation</u> of the uses to which a landlord could put a building, the majority's analysis might be appropriate. What is involved here, however, is a State-authorized <u>physical</u>

appropriation of a portion of the landlord's property for the use of the cable television corporation. Such appropriations have long been considered clear cases of compensable takings, and courts have not resorted to the various balancing tests applied to State regulation under the police power. As will be shown, this court in the past has recognized the distinction between the two concepts--a distinction the majority now blurs.

The just principle that a taking of a person's property for the use of the public must be fairly reimbursed has deep roots in our legal tradition. Indeed, the drafters of the Bill of Rights included in the Fifth Amendment the injunction "nor shall private property be taken for public use, without

just compensation." As this nation's economy grew in the early 19th century, the power of eminent domain became a widely used tool to spur growth through construction of turnpikes, railroads, canals and other industrial and commercial ventures that were viewed by legislatures as beneficial to society. As a counterweight to this power, by the middle of that century the bulk of the states had added clauses to their own constitutions to require that such takings be justly compensated (see Horwitz, the Transformation of America Law , pp 63-66).

During the same period there arose the separate concept of the State's police power imposing restraints upon the use of property, when that use might conflict with the

health, safety, or other important interests of society. This power, as articulated in 1851 by Chief Justice Shaw of Massachusetts, was based on the principle that "every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious * * * to the rights of the community" (Commonwealth v Alger, 7 Cush 53, 84-85 [Mass.]). But Shaw was careful to note that this regulation under the police power, which did not require compensation, "is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it" (Commonwealth v

Alger, 7 Cush 53, 85, supra [Mass.]).

Although this distinction was theoretically tidy, it became apparent with the growth of government regulation that private property could be so heavily regulated as to lose all practical value to its owner. The Supreme Court applying the Fifth Amendment "taking clause" to the states through the Fourteenth Amendment, recognized that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking" (Pennsylvania Coal Co. v Mahon, 260 US 393, 415 [Holmes, J]). Because courts often refer to instances of excessive regulation as takings, as the Supreme Court did in Mahon, the difference between regulation under the police power and taking, in the sense

of appropriation, of property under the eminent domain power is sometimes misunderstood.

What Mahon and the subsequent police power regulation cases have done is to create a right to compensation in addition to that already existing for the outright appropriation of private property. It is true that the courts over the years have been able to create "no set formula to determine where regulation ends and taking begins" (Goldblatt v Hempstead, 369 US 590, 594). The constantly changing nature of government regulation in a modern society and the myriad factual situations in which regulation can arise doom attempts to find simple answers.[1]

1. Scholars have also struggled to construct theoretical models for guidance in deciding

Fn 1 continued on next page.

The courts have instead generally made "essentially ad hoc" determinations, with emphasis given to a variety of

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(Fn 1 continued)

such cases. Professor Sax framed the question as whether the government in its regulation was acting in its entrepreneurial capacity or merely arbitrating between private factions. He observed that "the acquisition of title or the taking of physical possession will be present in the great majority of taking cases under this theory. But--and this is the important point--the presence or absence of a formal title-acquisition and/or invasion will never be conclusive. These formalities are not necessarily present when the government as an enterpriser, is acquiring resources for its own account" (Sax, Takings and the Police Power, 74 Yale L.J. 36, 67). He has since expressed the view that the question was "considerably more complex" than his original formulation took into account (Sax, Takings, Private Property and Public Rights, 81 Yale L.J. 149, 150 n. 5). Another thorough discussion of the limits of police power regulation of property was offered by Professor Michelman (Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law, 80 Harv L Rev 1165). These dicussions focus on the hard-to-define boundary between valid police power regulation and de facto takings, however, not on cases of clear appropriation of property for public use as is involved here.

factors (Penn Central Transp. Co. v New York City, 438 US 104, 124, affg 42 NY 2d 324; see, e.g. Goldblatt v Hempstead, 369 US 590, supra; United States v Central Eureka Mining Co., 357 US 155; Spears v Berle, 48 NY2d 254; French Investing Co. v City of New York, 39 NY2d 587).

Whatever difficulties courts have encountered in formulating a standard for determining when regulation under the police power is the equivalent of a taking, however, there has been no doubt whatever that the physical appropriation itself of property for public use--the traditional form of a taking--continues to require compensation.

Only four years ago, this court discussed at length the separate natures of a traditional physical taking of property and unconstitutionally excessive regulation limiting the use of property, and the different analysis each required (French Investing Co. v City of New York, 39 NY2d 587, 593-597, supra; see, also, Spears v Berle, 48 NY2d 254, 262, supra; New York Tel. Co. v North Hempstead, 41 NY2d 691, 696-697).[2]

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2. People ex rel. Durham Realty Corp. v La Fetra (230 NY 429; app dsmd 257 US 665) and People ex rel. Rayland Realty Co. v Fagan (194 App Div 185, affd 230 NY 653), cited by the majority, do not stand for the proposition that property can be taken for public use without compensation. The court upheld statutes preventing landlords for two years from summarily evicting tenants upon the expiration of their leases and limiting rent to a reasonable amount. There was no appropriation of any portion of the landlord's buildings. The

Fn 2 continued on next page.

By analyzing as an exercise of the State's police power what is in reality a clear example of a taking in the traditional sense of physical appropriation, the majority has removed

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(Fn. 2 continued)

court held that to the extent the police power regulations limited landlords' power to evict existing tenants, compensation in the form of reasonable rent was provided. The rent control cases involved government regulation that only impaired the property interests of landlords in obtaining as much rent as possible for their apartments and in summarily evicting those tenants unwilling to pay the increased rents. There was no restriction of the landlords' power to choose among prospective new tenants. Such regulation is similar to environmental or zoning regulations that limit the profitability of an owner's property. It is qualitatively different from government action setting aside a portion of the landlords' property for a public use.

Likewise, PruneYard Shopping Center v Robins (447 US 74) is not apposite. That case involved state restrictions of a shopping center's power to limit the exercise of free speech and petition rights by some members of the public, where the general public was in-

Fn 2 continued on next page.

an important barrier to uncompensated takings of private property. An owner who challenges the regulation of property under the police power "must sustain a heavy burden of proof, demonstrating that under no permissible use would the parcel as a whole be capable

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(Fn 2 continued)

vited to the center. The Supreme Court found that this restriction did not rise to the level of a taking, as contrasted with the situation presented in Kaiser Aetna v United States (444 US 164).

In reaching this conclusion the Supreme Court weighed factors, such as interference with investment-backed expectations, that are appropriate for determining whether government regulation constitutes a de facto taking. Unlike PruneYard, the instant case involves more than a limitation on a property owner's right to exclude certain members of the public. It involves the physical appropriation of portions of the owner's building for the installation of equipment and cables. This is what makes it a taking of the traditional type. It should also be noted that the free speech and petition interests of the public that were protected by the State regulation in PruneYard do not exist here.

of producing a reasonable return or be adaptable to other suitable private use" (Spears v Berle, 48 NY2d 254, 263, supra). Yet where an actual appropriation of private property for public use is concerned, the taking of even a minimal amount of property will entitle the owner to compensation. "The modern significance of physical occupation is that courts, while they sometimes do hold nontrespassory injuries compensable, never deny compensation for a physical takeover. The one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, 'regularly' use, or 'permanently' occupy, space or a thing which theretofore was understood to be under

private ownership. This may be true although the invasion is practically trifling from the owner's point of view" (Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law, 80 Harv L Rev 1165, 1184-1185, supra [emphasis in original]). Thus, for instance, this court has held the owner entitled to compensation where the State takes a roadway that was mapped but never constructed (City of Albany v State, 28 NY2d 352) or where a gas main is placed in land already covered by a public road (Heyert v Orange & Rockland Utilities, 17 NY2d 352).

The majority in effect reasons that because excessive and improper regulation under the police power is

sometimes termed a de facto taking, police power analysis can therefore be applied to all takings, even those clearly falling into the traditional public appropriation category. This turns the de facto taking concept, originally an expansion of the traditional protection of the right to compensation, into a tool to sharply curtail that right.

Here the cable television company has run its cables across the roof and down the front of the building and into the building, without the owner's authorization. It seeks to assert what is, in effect, an easement in gross (see Antonopulos v Postal Telegraph Cable Co., 261 App Div 564, affd 287 NY 712; cf. Real Property Law, § 261). Eminent domain proceedings, with appro-

priate compensation, have traditionally been the method of acquiring rights of way for telegraph, telephone, electric and other utility lines over or through private property when voluntary agreements cannot be reached (see Transportation Corporations Law, Article 3; see, generally, 26 Am Jur 2d, Eminent Domain, § 58, pp 714-715). The majority offers no rationale that justifies treating cable televison corporations differently than telephone companies, power suppliers and other utilities. Certainly these other corporations provide services that are just as necessary and beneficial to society, if not more so. Indeed, it is for such purposes that the eminent domain power itself is intended to be employed. If mere social utility can

provide a basis under the police power for infringement of private property rights such as the majority would countenance here, there is no reason why this concept should not be extended to also permit telephone companies to place poles across a person's front yard or a gas company to bury its lines under it without any requirement for fair compensation.

The anomalous nature of the majority's position is highlighted by comparison with New York Tel. Co. v Town of North Hempstead, supra. In that case, the town placed light fixtures on the utility's poles without the company's permission. This court unanimously held that this was "a clear instance of a taking of private property for the use of the municipality"

(41 NY2d 691, 697, supra).[3] The majority attempts to distinguish New York Telephone by noting that it involved direct placement of lights on the utility poles by the town, while in this case the government merely authorized action by a private corporation. The Supreme Court, however, has not hesitated to find a taking where private parties acted under government authorization. In Delaware, Lackawanna and Western Railroad Company v Town of Morristown (276 US 182), for instance, the court held that a regulation requiring the railroad to provide space

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3. Although the court found the installation of light fixtures to be an appropriation of private property falling outside the valid scope of the police power, it also held that the taking involved personal property and that the town's eminent domain power extended only to real property.

on its grounds for private taxicabs was an unconstitutional taking (see, also, Pumpelly v Green Bay Company, 13 Wall [80 US] 166). Under the principles of eminent domain, the mere fact that the Legislature has authorized a private corporation to take property for a public purpose, rather than the government taking property itself, does not wipe out the property owner's right to just compensation (see 26 Am Jur 2d, Eminent Domain §20, pp 663-665). There is no reason whatever that the property owner should be foreclosed from fair compensation here.

The requirement of just compensation where private property is appropriated for a public use has long been recognized by this and other courts. It is a concept distinct from that of a

de facto taking, which provides a limit to uncompensated police power regulation, not a cutback on the requirement for compensation for physical appropriation. The majority simply fails to recognize this distinction. In treating the clear physical appropriation of the landlord's property as an exercise of the police power, the majority wipes out an important protection against improper government encroachment on private property rights.

This case involves a clear instance of a taking requiring just compensation, yet the payments here fall far short of what is required both by constitutional standards and by fundamental principles of condemnation law. The regulations of the Commission provide that a landlord may apply for a

reasonable fee for allowing installation of cable television equipment, and the Commission will pass upon the landlord's application (9 NYCRR 598.2, 598.7). That same Commission, however, has already declared that the reasonable fee, "absent a special showing of greater damages attributable to the taking, is a payment of a one-time, $1.00 fee" (State Commission on Cable Television, Clarification of General Policy, August 27, 1976, p 4). Thus, what constitutes a reasonable fee is established by administrative fiat rather than by judicial hearing. This blanket declaration cannot realistically be seen as providing a fair assessment of the damage that an apartment building owner has suffered

through the installation of cables and transmission equipment. The folly of the enacted scheme is apparent not only from the obvious gross inadequacy of the token dollar payment but also from the uniformity of the dollar payment regardless of the extent of the taking from different property owners.

And it cannot be suggested that the owner wait until some future time, when construction or other form of development, even by a subsequent owner, has rendered the cables and equipment a serious actual impediment, before seeking compensation. It is a long-accepted principle that an owner is entitled to compensation for the value of the property at the time of the taking (see, e.g., Nichols, Law of Eminent Domain, § 12.23, p 12-117).

Finally, it should be noted that the instant method of determining compensation comports with the procedural requirements of neither the former Condemnation Law, in effect when this action began, nor the superseding Eminent Domain Procedure Law.[4]

For these reasons, I must dissent and vote to reverse.

Decided May 7, 1981

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4. Although the new Eminent Domain Procedure Law had not yet taken effect when the complaint was filed, the statement of purpose contained in that revision states principles that are nonetheless apt here: "[i]t is the purpose of this law to provide the exclusive procedure by which property shall be acquired by exercise of the power of eminent domain in New York state; to assure that just compensation shall be paid to those persons whose property rights are acquired by the exercise of the power of eminent domain; * * * to encourage settlement of claims for just compensation and expedite payments to property owners; to establish rules to reduce litigation, and to ensure equal treatment to all property owners" (EDPL, §101; see, also, section 3 of former Condemnation Law).

State of New York

Court of Appeals

Joseph W. Bellacosa

Clerk of the Court

June 10, 1981

Michael S. Gruen, Esq.
Gruen, Muskin & Thau
500 Fifth Avenue
New York, New York 10110

Re: No. 107 - Loretto v. Teleprompter

Dear Mr. Gruen:

The Court has asked me to advise you in response to your letter of June 3, 1981 that:

1. The opening line of footnote 6 [A9] will be changed, as indicated by underlining, to read:

   "Plaintiff did not seek summary judgment with respect to damages in etc."

2. The 580 reference at page 17 [A43] has been checked and is correct.

3. The page reference in footnote 24 [A55] will be corrected to 50-60.

Very truly yours,

/s/
Joseph W. Bellacosa

cc: John T. Fitzpatrick, State Reporter

Shea & Gould
Hon. Robert Abrams, Attorney General
Hon. Allen G. Schwartz, Corporation Counsel

COURT OF APPEALS

STATE OF NEW YORK

The Hon. Lawrence H. Cooke,
Chief Judge, Presiding

1 No. 107
Jean Loretto, &c.,
Appellant,
v.
Teleprompter Manhattan CATV
Corp., et al.,
Respondents.

The appellant in the above entitled appeal appeared by Michael S. Gruen, Esq. the respondent(s) appeared by Shea, Gould, Climenko & Casey, Esqs.; Allen G. Schwartz, Corporation Counsel.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs. Opinion by Meyer, J. All concur, Gabrielli, J., in a separate opinion; except Cooke, Ch.J., who dissents and votes to reverse in an opinion.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, New York County.
there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/
Joseph W. Bellacosa,
Clerk of the Court

Court of Appeals, Clerk's Office,
Albany, May 7, 1981.

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-five day of November A.D. 1980

PRESENT, HON. LAWRENCE H. COOKE, Chief Judge, presiding.

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1 Mo. No. 1174
Jean Loretto, on Behalf of Herself &c.,
Appellants,
vs.
Teleprompter Manhattan CATV Corp., Teleprompter Corporation and City of New York,
Respondents.

A motion having heretofore been made herein upon the part of the Attorney General of the State of New York, as intervenor, to dismiss the appeal taken by the appellants in the above cause to this Court, said motion having been joined in upon the part of respondents Teleprompter Manhattan CATV

Corp. and Teleprompter Corporation, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/
Joseph W. Bellacosa
Clerk of the Court

1 Mo. No. 1174
Jean Loretto, on Behalf of Herself &c.,
Appellants,
vs.
Teleprompter Manhattan CATV Corp. Teleprompter Corporation and City of New York,
Respondents.

Motion to dismiss the appeal denied.

DECISION COURT OF APPEALS
NOV 25 1980

STATE OF NEW YORK
SUPREME COURT - COUNTY OF NEW YORK

JEAN LORETTO, on behalf of herself and all others similarly situated,

Plaintiff-Appellants,

-against-

TELEPROMPTER MANHATTAN CATV CORP., TELEPROMPTER CORPORATION and CITY OF NEW YORK.

Defendants-Respondents.

ORDER FOR
JUDGMENT
ON
REMITTITUR

INDEX NO.
8300/76

PRESENT: HON. LOUIS GROSSMAN
Justice Presiding

The Plaintiffs-Appellants herein, having appealed to the Court of Appeals of the State of New York, from an Order of the Appellate Division, First Department, entered in the office of the Clerk of said Court on the 11th day of December, 1979, which Order unanimously

affirmed, without opinion, a judgment of the Supreme Court, New York County (Grossman, J.) entered April 11, 1979, which granted summary judgment to the defendants and dismissed the complaint, and the Court of Appeals, having heard said appeal and ordered and adjudged that the Order so appealed from be affirmed, with costs, and the Remittitur of the Court of Appeals having been filed in the office of the Clerk of the County of New York,

NOW, on motion of Robert Abrams, by Lawrence J. Logan, it is hereby

ORDERED, that the aforesaid Order of the Appellate Division, First Department be, and the same is hereby affirmed, and that a judgment of this Court be entered herein affirming said

Order, with costs to be taxed against the Plaintiffs-Appellants herein.

Signed the 19th day of May, 1981.

/s/
LOUIS GROSSMAN
Justice Supreme Court

ENTER

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 11, 1979

Present--Hon. Theodore R. Kupferman,
Justice Presiding
Leonard H. Sandler
Joseph P. Sullivan
Max Bloom
Samuel J. Silverman Justices

Jean Loretto, on behalf of herself and all others similarly situated,

Plaintiffs-Appellants,

-against-

Teleprompter Manhattan CATV Corp., Teleprompter Corporation and City of New York,

Defendants-Respondents.

6940

An appeal having been taken to this Court by the plaintiffs-appellants from an order and judgment (one paper) of the Supreme Court, New York County, (Grossman, J.), entered on April 11, 1979, inter alia granting summary judgment to defendants dismissing the complaint and denied plaintiff partial summary judgment, intervention of an additional plaintiff and denied amend-

ment of the class action order and said appeal having been argued by Mr. Michael S. Gruen of counsel for the appellants, and by Mr. Michael Lesch of counsel for the respondents Teleprompter and due deliberation having been had thereon,

It is unanimously ordered that the order and judgment (one paper) so appealed from be and the same is hereby affirmed. Respondents Teleprompter shall recover of appellant $75 costs and disbursements of this appeal.

ENTER:

/s/

Clerk.

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of New York, 60 Centre Street, New York, New York on the 2nd day of April, 1979.

PRESENT:

HON. LOUIS GROSSMAN

JUSTICE.

- -x

JEAN LORETTO, on behalf of herself and all others similarly situated,

Plaintiff,

-against-

TELEPROMPTER MANHATTAN CATV CORP., TELEPROMPTER CORPORATION and CITY OF NEW YORK,

Defendants.

- -x

Index No. 8300/76

ORDER AND JUDGMENT

Defendants, Teleprompter Manhattan CATV CORP. and Teleprompter Corporation (the "Teleprompter Defendants") having moved this Court by notice of motion dated February 17, 1978 for an

order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint herein; defendant, City of New York (the "City") having moved this Court by notice of motion dated February 17, 1978 for an order granting summary judgment to the City; plaintiff having cross-moved this Court by notice of motion dated April 28, 1978 for an order pursuant to CPLR 3212 granting partial summary judgment in favor of plaintiff; the Teleprompter Defendants having moved this Court by notice of motion dated May 11, 1978 for an order pursuant to CPLR 2221 granting them leave to renew their opposition to plaintiff's motion for class action determination herein and upon the renewal thereof, for an order denying plaintiff's motion for class determination

(the "Renewal Motion"); Neilson Abeel having moved this Court by notice of motion dated August 4, 1978 for an order permitting him to intervene in this action as a plaintiff and representative of the class and for an order amending the class action order entered herein with respect to the definition of the class (the "Intervention Motion") and plaintiff and Neilson Abeel having moved by notice of motion dated October 5, 1978 for an order granting plaintiff summary judgment pursuant to CPLR 3212, for an order permitting intervention of Neilson Abeel as a party plaintiff and for amendment of the class action order;

Now, upon reading and filing the aforesaid notices of motion and the affidavits of Barry P. Simon, unsworn

and dated February, 1978, and Ronald Simon, sworn to February 17, 1978, and the exhibits annexed thereto, in support of the Teleprompter Defendants' motion for summary judgment, the affirmtion of John C. Brennan, dated March 7, 1978, in support of the City's motion for summary judgment, the affirmation of Michael S. Gruen, dated April 28, 1978, and the exhibits annexed thereto, and the affidavit of Jean Loretto, sworn to April 21, 1978, in opposition to defendants' motions for summary judgment and in support of plaintiff's cross-motion for partial summary judgment, the supplemental affirmation of Michael S. Gruen, dated October 5, 1978, and the exhibits annexed thereto, in further opposition to defendants' motions for summary judgment and in

further support of plaintiff's cross-motion for partial summary judgment, the affidavit of Michael Lesch, sworn to May 11, 1978, and the exhibits annexed thereto, in support of the Teleprompter Defendants' Renewal Motion, the affirmation of Michael S. Gruen, dated August 4, 1978, and the exhibits annexed thereto in opposition to the Teleprompter Defendants' Renewal Motion and in support of plaintiff's motion to amend the class action order, the affidavit of Neilson Abeel, sworn to June 9, 1978, and the exhibit annexed thereto, in support of the Intervention Motion, the affidavit of Larry F. Gainen, sworn to November 2, 1978, and the exhibits annexed thereto, in opposition to the Intervention Motion, and the affirmation of Daniel J. Sulli-

van, dated November 6, 1978, and the exhibits annexed thereto, in further support of the Intervention Motion and in reply to the opposition of defendants to said motion, and said motions having come on to be heard on November 3, 1978 and due deliberation having been had thereon and this Court having rendered a decision dated March 14, 1979,

Now, on motion of Shea Gould Climenko & Casey, attorneys for defendants, Teleprompter CATV Corp. and Teleprompter Corporation, it is

ORDERED, that motions numbered 89, 90, 91 and 94 on the calendar of November 3, 1978 are consolidated for disposition; and it is further

ORDERED and ADJUDGED, that the Teleprompter Defendants' motion for

summary judgment be, and the same hereby is, granted to the extent of declaring that the statute (Section 828 of the Executive Law) represents a reasonable and, therefore, justifiable exercise of the police power of the State, both with respect to cable TV components placed directly on premises serviced by the Teleprompter Defendants and premises on which equipment is placed to service another building; and it is further

ORDERED, that the City's motion for summary judgment be, and the same hereby is, granted in all respects; and it is further

ORDERED, that plaintiff's cross-motion for partial summary judgment be, and the same hereby is, denied in all respects; and it is further

ORDERED, that the Teleprompter Defendants' motion to renew their opposition to plaintiff's class action motion and upon the renewal thereof, for an order denying plaintiff's motion for class action determination be, and the same hereby is, denied as moot; and it is further

ORDERED, that Neilson Abeel's motion for an order permitting him to intervene in this action as a plaintiff and representative of the class be, and the same hereby is, denied as moot; and it is further

ORDERED, that plaintiff's motion for an order amending the class action order with respect to the definition of the class be, and the same hereby is, denied as moot; and it is further

ORDERED AND ADJUDGED, that plain-

tiff's complaint against defendants Teleprompter Manhattan CATV Corp. Teleprompter Corporation and the City of New York be, and the same hereby is, dismissed and the defendants recover as costs and disbursements from the plaintiff, Jean Loretto, the sum of $300.00, as taxed by the Clerk.

E N T E R

/s/
J.S.C.

FILED
April 11, 1981
New York
Co. Clerk's Office

SUPREME COURT : NEW YORK COUNTY
SPECIAL TERM : PART I

- -x

JEAN LORETTO, on behalf of herself and all others similarly siutated,

Plaintiff,

-against-

TELEPROMPTER MANHATTAN CATV CORP. and TELEPROMPTER CORPORATION,

Defendants.

- -x

Index No. 8300/76

GROSSMAN, J:

Motions #89, 90, 91 and 94 on the calendar of November 3, 1978 are consolidated for disposition.

The main motion (No. 94) in this class action instituted by plaintiff Jean Loretto, formerly the owner of residential premises located at 303 West 105th Street (ownership was recently transferred to a corporation wholly owned by plaintiff) seeks to test the constitutionality of section 828 of the

Executive Law, which became effective on January 1, 1973. Defendant City of New York and the remaining defendants (Teleprompter) move by separate motions (Nos. 91 and 94) for similar relief.

The challenged statute, essentially, bars landlords from interfering with the installation of cable television facilities upon their property and limits payment for such use of the property to the amount awarded by the Commission on cable television. (The Commission has, to date, made only nominal awards of $1.00 and has effectively ruled that it will continue to make such awards absent a showing by a landlord that greater damages are attributable to the installation of cable TV components.) Also at issue is whether Executive Law, section 828(1)(b) pur-

ports to authorize Teleprompter to place equipment on the premises of one landlord to service the tenants of another building farther removed from the source of transmission.

Plaintiff argues that the virtually free installation of cable TV components on private property authorized by the statute amounts to an uncompensated trespass and condemnation of property that constitute a "taking" without due process. It is further urged that the proper measure of compensation is the 5% of Teleprompter's gross revenues that was customarily paid to landlords before the adoption of the statute.

The motion is granted to the extent of declaring that the statute represents a reasonable, and therefore,

justifiable exercise of the police power of the State both with respect to cable TV components placed directly on premises serviced by Teleprompter and premises on which equipment is placed to service another building. There is no question that the obvious public advantage sought to be served by the legislation under attack greatly outweighs the insignificant nature of the physical use of private property permitted by the statute. Further, it is not contended that such use has an adverse economic impact on the income-producing potential of rental premises. (cf. French Inv. Co. v. City of New York, 39 N Y 2d 587, 593-596).

Plaintiff has clearly failed to meet the heavy burden imposed on a party seeking to overcome the strong

presumption of constitutionality inherent in every statute enacted by the Legislature. In addition, in the absence of compelling circumstances making a declaration of unconstitutionality unavoidable, it is not the province of a court of first instance to strike down a statute as invalidly adopted. (Statutes, Section 150; Stewart v. Strauss, 11 Misc 2d 433, 436).

In light of the foregoing the remaining application (No. 90) which seeks relief bearing on the class action nature of this litigation has become academic and, considered as such, is denied.

Settle judgment.

Dated: March 14, 1979

/s/

J. S. C.

At a Special Term, Part I of the Supreme Court held in and for the County of New York at the County Courthouse, 60 Centre Street, on the 6th day of July, 1977.

P R E S E N T:
HON. XAVIER C. RICCOBONO
Justice.

----------x

JEAN LORETTO, on behalf of herself and all others similarly situated,

Plaintiff,

-against-

TELEPROMPTER MANHATTAN CATV CORP. and TELEPROMPTER CORPORATION,

Defendants.

----------x

ORDER PERMITING INTERVENTION

Index No. 8300/76

A motion having been duly made to this Court for an order permitting the City of New York to intervene in the above-captioned action now pending before this Court,

NOW, upon reading and filing the affirmation of JOHN C. BRENNAN, dated March 14, 1977, the proposed answer annexed thereto, the notice of motion, dated March 15, 1977, and upon all the pleadings and proceedings heretofore filed herein, and it appearing that such intervention will not unduly delay or prejudice the adjudication of the rights of the original parties,

NOW, on motion of W. BERNARD RICHLAND, attorney for the City of New York, it is

ORDERED that said motion be, and the same hereby is, in all respects granted; and it is further

ORDERED that the City of New York be and hereby is permitted to intervene in this action as a party defendant; and it is further

ORDERED that the caption of this action be amended by adding thereto the City of New York, as a party defendant; and it is further

ORDERED that a copy of this Order with notice of entry be served by the Corporation Counsel of the City of New York upon the Clerk of the Court who is directed to mark his records to reflect the addition of the added party defendant; and it is further

ORDERED that the City of New York be and hereby is permited to serve the proposed answer attached to the motion papers herein upon the attorneys for the parties herein or otherwise move with regard to said complaint within 10 days of the date hereof.

E N T E R

/S/ XCR
J.S.C.

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of New York, at the County Courthouse thereof, on the 6 day of July, 1977.

P R E S E N T:
HON. ABRAHAM J. GELLINOFF,
Justice.

----------x

JEAN LORETTO, on behalf of herself and all others similarly situated,

Plaintiff,

-against-

TELEPROMPTER MANHATTAN CATV CORP. and TELEPROMPTER CORPORATION,

Defendants.

----------x

Index No. 8300/76

ORDER

Upon the consent of the parties hereto, as reflected by the stipulation herein dated July 1, 1977, the Order entered herein on March 23, 1977, and the Order entered herein on June 10, 1977, modifying said Order of March 23,

1977, it is

ORDERED, that paragraphs "5", "7" and "8" of said Order of March 23, 1977 be modified to provide as follows:

"5. The plaintiff herein is permitted to maintain a class action on behalf of all owners of real property in the State of New York on which defendant Teleprompter Manhattan CATV Corp. or Teleprompter Corporation or any subsidiaries of such corporations, have placed any cable television components (such as coaxial cables, amplifiers and transformers). There is excepted from the class any owner of real property on which any such components have been placed which perform the exclusive function of providing service to the only dwelling unit on such property, such unit being a single family dwelling."

* * *

"7. Prior to mailing notice, plaintiff shall rent a numbered post-office box in the City of New York in the name of the Clerk of the Court for the purpose of receiving Exclusion Requests and all other communications and inquiries regarding notice of this class action. All notices to class members shall bear the caption of this action and be sent in

> the name of the Clerk of the Court and shall bear the designation of said post-office box as the return address.
>
> "8. Defendants shall, on or before August 31, 1977 furnish to counsel for plaintiff a list of the names and addresses (as reflected in the records of said defendants) of the owners of (or, if such records do not identify the owners, other responsible persons with whom there are communications concerning) real property in the State of New York on which either defendant or any subsidiaries of either defendant have placed any cable television components such as coaxial cables, amplifers and transformers ('list of Owners') other than owners (or such other responsible persons) excepted from the class."

and it is further

ORDERED, that plaintiff's time to notify the class in the manner provided by paragraph "9" of the Order entered herein on March 23, 1977 shall commence with the delivery by defendants to plaintiff's counsel of the last portion of the list of Owners; and it is further

ORDERED, that except as modified hereinabove, the Order entered herein on March 23, 1977 remains in full force and effect.

E N T E R

/s/
J.S.C.

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of New York, at the County Courthouse thereof, on the 10 day of June, 1977.

Present: HON. ABRAHAM J. GELLINOFF

----------x

JEAN LORETTO, on behalf of herself and all others similarly situated,

Plaintiff,

-against-

TELEPROMPTER MANHATTAN CATV CORP. and TELEPROMPTER CORPORATION,

Defendants.

----------x

Index No. 8300/76

ORDER

Upon the consent of the parties hereto, as reflected by the Stipulation herein dated June 9, 1977, and the Order entered herein on March 23, 1977, it is

ORDERED, that the time for defendants to furnish to counsel for plain-

tiff a list of names and addresses of the owners of real property in the State of New York on which either defendant has placed any cable television components such as coaxial cables, amplifiers and transformers ("list of Owners") be, and the same hereby is extended to and including June 29, 1977; and it is further

ORDERED, that plaintiff's time to notify the class in the manner provided by paragraph "9" of the order entered herein on March 23, 1977 shall commence with the delivery by defendants to plaintiff's counsel of the last portion of the list of Owners; and it is further

ORDERED, that except as modified hereinabove, the order entered herein on March 23, 1977 remains in full force

and effect.

E N T E R

/s/
J.S.C.

FILED
June 10, 1977
New York
Co. Clerk's Office

SUPREME COURT OF THE STATE OF NEW YORK,
SPECIAL TERM PART I, NEW YORK COUNTY
at the Courthouse thereof, 60 Centre
Street, New York, New York 10007.

Present: Hon. BERNARD NADEL
Justice

JEAN LORETO, etc.

-against-

TELEPROMPTER MANHATTAN CATV CORP
et ano

Upon the foregoing papers this motion for leave to serve the amended answer setting forth certain affirmative defenses is granted. The proposed amended pleading is not patently insufficient, is apparently made in good faith and will not result in undue prejudice to the plaintiff. The proposed amended answer in the form annexed shall be deemed served within ten days after service of a copy of this order with notice of entry thereon.

Dated 5-6-77

/s/
J.S.C.

County Clerk's No. 8300, 1976

FILED
May 10, 1977
New York
County Clerk's Office

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of New York, at the County Courthouse thereof, on the 21 day of March, 1977

Present: HON. ABRAHAM J. GELLINOFF
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------x

JEAN LORETTO, on behalf of herself and all others similarly situated,

Plaintiff,

-against-

TELEPROMPTER MANHATTAN CATV CORP. and TELEPROMPTER CORPORATION,

Defendants.

----------x

Index No. 8300/76

ORDER

Defendants, by their attorneys, Shea Gould Climenko & Casey, having duly moved for an order (i) staying all discovery until such time as the Court determines that the action may proceed as a class action, (ii) extending De-

fendants' time to answer Plaintiff's Interrogatories to which Defendants do not make proper and timely objections, (iii) extending Defendants' time to appear for examination before trial, (iv) deleting certain items from Plaintiff's Notice for Discovery and Inspection on grounds of irrelevance, immateriality and failure to identify with particularity, (v) striking from Plaintiff's Interrogatories certain Interrogatories on grounds of irrelevance, immateriality, assumption of a state of facts which have not been established, calling for legal conclusions, excessive breadth, and other grounds; and

Plaintiff, by her attorney Michael S. Gruen, having duly cross-moved for an order determining that this action may be maintained as a

class action and directing the holding of a preliminary hearing to determine the proper allocation of the costs of giving notice to the class; and

Said motion and cross-motion having regularly come on to be heard;

Now, upon reading and filing the Complaint and Answer, the Notice of Motion dated May 4, 1976, and exhibits thereto (including Plaintiff's Notice for Discovery and Inspection, Interrogatories, and Notice to Take Deposition Upon Oral Examination of Defendant Teleprompter Manhattan CATV Corp.), Plaintiff's Notice to Take Deposition Upon Oral Examination of Defendant Teleprompter Corporation, the stipulation of counsel to both parties pertaining thereto, the Notice of Cross-motion dated May 18, 1976, the affida-

vit of Thomas A. Dickerson sworn to May 3, 1976 in support of the Motion, the affidavit of Michael S. Gruen sworn to May 18, 1976 in support of the Cross-Motion and in Opposition to the Motion, the affidavit of Ira Postel sworn to June 2, 1976 in support of the Motion and in opposition to the Cross-Motion the affidavit of Barry P. Simon sworn to October 21, 1976 in opposition to the Cross-Motion, the supplemental affidavit of Barry P. Simon sworn to November 5, 1976 with exhibits in opposition to the Cross-Motion, and written argument of counsel on both sides; and

Upon the decision and opinion of the Court dated December 15, 1976, it is;

ORDERED, that

1. Defendants' motion to

strike plaintiff's Notice of Discovery and Inspection is granted.

2. Defendants' motion to strike certain interrogatories is denied and defendants shall respond to the interrogatories within thirty days from publication of the Court's decision herein or at such other time as the parties may agree.

3. Defendants' motion to extend defendants' time to appear for examination before trial is denied and defendants shall appear for examination within thirty days from publication of the Court's decision herein or at such other time as the parties may agree.

4. Plaintiff's Cross-Motion for an order determining that this action may be maintained as a class action is granted to the extent provided

herein.

5. The plaintiff herein is permitted to maintain a class action on behalf of all owners of real property in the State of New York on which defendant Teleprompter Manhattan CATV Corp. or Teleprompter Corporation, or any subsidaries of such corporations, has placed any cable television components (such as coaxial cables, amplifiers and transformers).

6. The Notice to Class Members (the "Notice") and Request for Exclusion (the "Exclusion Request") to be mailed to the persons described below shall be in the form annexed hereto as "Exhibit A".

7. Plaintiff shall promptly rent a numbered post-office box in the City of New York in the name of the

Clerk of the Court for the purpose of receiving Exclusion Requests and all other communications and inquiries regarding notice of this class action. All notices to class members shall bear the caption of this action and be sent in the name of the Clerk of the Court and shall bear the designation of said post-office box as the return address.

8. Defendants shall, on or before 60 days after filing of this order, furnish to counsel for plaintiff a list of the names and addresses (as reflected in the records of said defendants) of the owners of real property in the State of New York on which either defendant has placed any cable television components such as coaxial cables, amplifiers and transformers ("list of Owners").

9. Within 60 days after receipt by her counsel of the list of Owners, plaintiff shall cause a copy of Exhibit A to be mailed by first class mail to all persons contained on the list of Owners and a further copy shall be similarly mailed, care of owner, to all premises on which defendants have placed cable television components.

10. Within 10 days after completion of the mailing provided in paragraph "9", plaintiff shall submit to the defendants for examination, and within 10 days thereafter the plaintiff shall file with the Clerk of the Court, an affidavit showing the names and addresses of the persons to whom the Notice and Exclusion Request were mailed together with a sample copy of the Notice and Exclusion Request as mailed.

11. Representatives of the attorney for plaintiff and of the attorneys for defendants shall be responsible for examining the contents of the post-office box one day per week, shall retain for subsequent filing with the Clerk all executed Exclusion Requests and other communications received and sent regarding the Notice or Exclusion Request and shall agree upon replies to any inquiries or communications regarding the Notice of exclusion Request. If the parties' attorneys cannot agree upon a reply, they shall refer the matter to the Court. The plaintiff shall file executed Exclusion Requests and communications aforesaid with the Clerk on a monthly basis with a list summarizing those class members who have requested exclusion from the

class.

12. All costs and expenses incurred in connection with the preparation, mailing and publishing provided hereinabove shall be borne by plaintiff.

/s/
J.S.C.

FILED
March 23, 1977
New York
Co. Clerk's Office

SUPREME COURT : NEW YORK COUNTY
SPECIAL TERM : PART I

----------x

JEAN LORETTO, on behalf of herself and all others similarly situated,

Plaintiff,

-against-

TELEPROMPTER MANHATTAN CATV CORP., and TELEPROMPTER CORPORATION,

Defendants.

----------x

Index No. 8300/76

GELLINOFF, J.:

Plaintiff, an owner of real property, brings this action against defendants, who construct and maintain cable television systems in New York, on a cause of action alleging trespass. The complaint alleges that defendants have attached their components to plaintiff's property for the purpose of servicing plaintiff's tenants, without plaintiff's consent, and without payment. In the motions now before the

court, plaintiff seeks an order permitting the action to be maintained as a class action (CPLR, art.9), and defendants seek a protective order limiting disclosure.

CPLR 901 provides the bases for the maintenance of a class action. The only serious dispute in the instant case is with respect to CPLR 901(a)(2), which requires that "there are questions of law and fact common to the class which predominate over any questions affecting only individual members." Plaintiff, urging that the appropriate class of plaintiffs is "all owners of real property in the State of New York on which either defendant has placed any CATV components" (Complaint, par. 5[b]), contends that the predominant issues common to all potential

plaintiffs are the constitutionality and applicability of section 828(1) of the Executive Law, which purports to prohibit interference by a landlord with the placing of television facilities upon his property. Defendants, on the other hand, contend that the question of trespass raises individual questions of liability and damage with respect to each potential plaintiff, precluding maintenance of a class action.

Article 9 was added to the CPLR in order to liberalize this state's rules with respect to class actions. "The central thrust of the new statute is to eliminate the requirement that the members of the class be in 'privity,' whatever that much-abused term means. Instead, the statute substi-

tutes functional criteria and pragmatic considerations that are concerned primarily with fairness to parties" (McLaughlin, Practice Commentary to Article 9 CPLR, McKinney's Consolidated Laws of New York, Book 7B, Supplement, p. 64). Utilizing such "functional criteria," the court concludes that, in this case, the common issues sufficiently predominate to warrant maintenance of this action as a class action.

This litigation basically involves two issues. The first -- the question of the constitutionality of section 828(1) -- directly affects all proposed members of the class. That section precludes landlords from seeking payment from defendants, or from their own tenants, for permission to attach defendant's components to the

landlord's property. If, as plaintiff claims, this statute constitutes an unlawful taking of property without compensation, all potential plaintiffs will be entitled to the relief requested.

The second dominant issue affects many, but not all, of the potential members of the class. That issue concerns the applicability of section 828 (1) to those property owners on whose property defendants have placed their equipment to provide service to a different building, further removed from the source of transmission, but without providing service to the tenants of the property owner.

All but one of the factual issues alleged by defendants are relatively minor compared to these two issues, and

are insufficient to warrant denial of a class action.

The one factor requiring modification of plaintiff's request is that section 828(1) is prospective in application, and leaves untouched those property owners who had entered into agreements with defendants prior to the effective date of the statute. Therefore, the appropriate class is not that stated in the complaint, but, rather, must be limited to owners of real property in the State of New York on which either defendant has placed any CATV components, who have not entered into a currently effective agreement with either defendant concerning such placement.

The nature of this particular action confirms the court's view that a

class action is appropriate. The damages to any specific potential plaintiff is likely to be small. It is thus reasonable to assume that any one of them alone would be unwilling to undertake this litigation. A class action is thus particularly proper here.

Defendants' motion to the extent that it seeks delay of discovery pending determination as to the status of this action, is denied as academic in light of the above. Defendants shall appear for examination, and respond to the interrogatories within thirty days after publication of this decision. Motion to strike certain specific interrogatories is denied. The challenged interrogatories are proper. Motion to strike the notice for discovery and inspection is granted.

Plaintiff has failed to demonstrate that the items therein sought are relevant to the cause of action alleged in the complaint.

Settle order, providing therein recommendations for the method of giving notice to the members of the class, and as to who shall bear the cost of such notice.

Dated: December 15, 1976

/s/
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

JEAN LORETTO, on behalf of herself and all others similarly situated,

Plaintiff,

-against-

TELEPROMPTER MANHATTAN CATV CORP., TELEPROMPTER CORPORATION, and CITY OF NEW YORK,

Defendants.

----------X

Index No. 8300/76

NOTICE OF APPEAL

PLEASE TAKE NOTICE, that Plaintiff Jean Loretto hereby appeals to the Supreme Court of the United States from such parts of the order of the Court of Appeals herein entered May 7, 1981 as affirm dismissal of the complaint and entry of judgment against Plaintiff. This appeal is taken pursuant to 28 U.S.C. §1257(2).

Dated: New York, New York
July 21, 1981

GRUEN, MUSKIN & THAU
Attorneys for Appellant
500 Fifth Avenue
New York, New York 10110
(212) 921-0844

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

WILLIAM J. RUSSO, being duly sworn, deposes and says:

1. I am over 18 years of age, not a party to this action and reside at 119 Rustic Place, Staten Island, New York.

2. On July 22, 1981, I served the within Notice of Appeal upon the following counsel of record:

SHEA & GOULD, ESQS.
Attorneys for Teleprompter
330 Madison Avenue
New York, New York 10017

HON. ROBERT ABRAMS
Attorney General of the
State of New York
The Capitol
Albany, New York 12224

ALLEN G. SCHWARTZ, ESQ.
Corporation Counsel of the
City of New York
100 Church Street
New York, New York 10007

by depositing the Notice of Appeal in a United States mailbox, with first class postage prepaid, addressed to the aforementioned counsel of record at their aforementioned post office addresses.

3. All parties required to be served have been served.

- /s/
WILLIAM J. RUSSO

Sworn to before me
this 22d day of
July, 1981.

FILED
'81 JUL 22 P.M. 4:06
County Clerk
New York County

/s/
Notary Public
Robin Vitale
Notary Public, State of New York
No. 43-4707582
Qualified in Richmond County
Commission Expires March 30, 1982

Joint Appendix

Office-Supreme Court, U.S.
FILED
DEC 14 1981
CLERK

No. 81-244

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JEAN LORETTO, on behalf of herself and all others similarly situated,

Appellant,

v.

TELEPROMPTER MANHATTAN CATV CORP., TELEPROMPTER CORPORATION and CITY OF NEW YORK

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

JOINT APPENDIX

MICHAEL. S. GRUEN
GRUEN, MUSKIN & THAU
Counsel for Appellant
500 Fifth Avenue
New York, N.Y. 10010
(212) 921-0844

ERWIN N. GRISWOLD
JONES, DAY, REAVIS & POGUE
Counsel for Teleprompter Appellees
1735 Eye Street, N.W.
Washington, D.C. 20006
(202) 861-3939

ALLEN G. SCHWARTZ
CORPORATION COUNSEL,
CITY OF NEW YORK
Counsel for Municipal Appellee
100 Church Street
New York, N.Y. 10007
(212) 566-6825

December 11, 1981

APPEAL DOCKETED AUGUST 4, 1981
PROBABLE JURISDICTION NOTED OCTOBER 19, 1981

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SUPREME COURT
OF THE UNITED STATES

JEAN LORETTO, on behalf of herself and all others similarly situated,	:	No. 81-244
Appellant,	:	
v.	:	
TELEPROMPTER MANHATTAN CATV CORP., TELEPROMPTER CORPORATION and CITY OF NEW YORK,	:	
Appellees.	:	

CHRONOLOGICAL LIST OF IMPORTANT DATES OF PLEADINGS, HEARINGS AND ORDERS:

January 26, 1976	Complaint (JtA5)
April 2, 1976	Teleprompter Answer (JtA21)
May 18, 1976	Cross-Motion by Plaintiff for Class Action Order
January 3, 1977	Motion by Teleprompter for leave to amend Answer

March 15, 1977	Motion by City of New York to intervene as party defendant (City's Answer JtA29)
March 23, 1977	Order entered granting class action status (JSA138)
May 10, 1977	Order entered granting Teleprompter's motion to amend Answer (JSA136)
July 6, 1977	Order entered amending definition of class (JSA129)
July 7, 1977	Order entered permitting intervention by City of New York (JSA126)
February 17, 1978	Motions by all Defendants for summary judgment
April 28, 1978	Cross-Motion by Plaintiff for summary judgment
May 11, 1978	Motion by Teleprompter to renew opposition to class action motion
August 4, 1978	Motion by Neilson Abeel to intervene and motion by Plaintiff to amend class action order

April 11, 1979	Order and Judgment entered granting Defendants' motions for summary judgment, denying Plaintiff's cross-motion for summary judgment, denying Teleprompter's motion to renew opposition to class action determination as moot, denying Neilson Abeel's motion to intervene as moot, and denying Plaintiff's motion to amend class action order as moot (JSA112)
December 11, 1979	Order of Appellate Division, First Department entered affirming Order and Judgment of Supreme Court, New York County (JSA110)
October 21, 1980	Motion by New York State Attorney General to New York Court of Appeals to dismiss for lack of substantial constitutional question
November 25, 1980	Order of New York Court of Appeals denying Attorney General's motion to dismiss (JSA104)

May 7, 1981	Order, New York Court of Appeals affirming Order of Appellate Division (JSA102)
July 21, 1981	Notice of Appeal to the United States Supreme Court
October 19, 1981	Order of Supreme Court of the United States noting probable jurisdiction

[COMPLAINT-SUPREME COURT NEW YORK COUNTY]

[Title omitted in printing]

Plaintiff, by her attorney, Michael S. Gruen, alleges for her complaint:

A. Jurisdiction and venue

1. Plaintiff is a resident of the City and County of New York.

2. Defendants Teleprompter Manhattan CATV Corp. ("Teleprompter Manhattan") and Teleprompter Corporation ("Teleprompter") are both corporations having their principal place of business in the City and County of New York.

3. The amount of damages recoverable in this action is believed to exceed $1,000,000.

B. Definitions

4. The following terms and phrases (and cognate terms and phrases where appropriate), as used herein, have the following meanings:

(a) "CATV components" includes, without limitation, antennae, coaxial cables, power supply, amplifiers, splitters, terminators, transformers, and receiving devices, as used in a CATV system.

(b) "CATV system" means a system for receiving television signals or impulses broadcast by one or more television and/or radio stations, and any other programs originated by use of the CATV system, and transmitting such signals, impulses and programs by wire, cable, microwave or other means.

(c) "Commission" means the Commission on Cable Television of the State of New York.

(d) "Owner" means any person having title to or a possessory interest in real property.

(e) "Placed on real property" means erected, constructed, affixed, or

maintained upon through, over, across, or under real property.

(f) "Real property" excludes roads, streets and highways title to which is in the State of New York or any subdivision thereof, and the transmission facilities of any telegraph and/or telephone corporation, or electric corporation, as defined in the Transportation Corporation Law.

C. Class Action Status

5. (a) Plaintiff brings this action as a class action pursuant to Article 9 of the Civil Practice Law and Rules.

(b) The class represented by plaintiff consists of all owners of real property in the State of New York on which either defendant has placed any CATV components. The class is estimated to consist of at least 10,000 members.

The class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable.

(c) The questions of fact common to all class members include the existence of trespasses by either defendant upon the real property of members of the class, the nature of the CATV components placed on such property, and the means by which such components are placed and attached to real property.

(d) The questions of law common to all class members include whether defendants are obligated to compensate members of the class represented by plaintiff for the placing of CATV components by either defendant on the real property of members of the class.

(e) There are questions of law and fact common to the classes which dominate over any questions affecting only individual members.

(f) Plaintiff's claim is typical of the claims of the class represented by plaintiff.

(g) Plaintiff will fairly and adequately protect the interests of the class represented by plaintiff.

(h) A class action is superior to other available methods for a fair and efficient adjudication of the controversy.

D. As and for her first Cause of Action against defendant, Teleprompter Manhattan, plaintiff alleges:

6. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 5 of this complaint.

7. At all times mentioned herein, defendant Teleprompter Manhattan, has constructed and maintained a CATV system in the City and County of New York. Insofar as it is material to this complaint, such system, on information and

belief, consists of master antennae used to receive television and radio signals from broadcasters; studios and other facilities to originate programs; a series of trunk cables used to carry such signals and programs from the antennae or studios to various geographical areas; branch cables leading from trunk cables and other branch cables to smaller geographical areas, buildings and apartments and rooms within buildings; amplifiers located at intervals along such cables to amplify the signals; fastening devices by which the cables and sub-cables are attached to real property, splitters, terminators and transformers; and converters, which receive the signal transmitted through the cables, allow the user to turn the device on and off, and select channels.

8. Since in or about 1966, defendant Teleprompter Manhattan has unlaw-

fully placed, and continues unlawfully to place, CATV components on or over the real property of the class represented by plaintiff.

9. In particular, in or about 1972, defendant Teleprompter Manhattan placed a CATV cable on the roof of premises, 303 West 105th Street, in the City and County of New York, owned by plaintiff. Such cable was placed in an east-west direction across the roof of plaintiff's said premises and attached to the premises with nails, brads, and other means of securing the cables to the roof of the said premises. Upon information and belief, the purpose of such cable was to permit transmittal of CATV signals from a source to the east of the said premises to various recipients located to the west of the said premises. Defendant Teleprompter Manhattan thereby mutilated and defaced plaintiff's property.

10. In further particular, in or about 1974, defendant Teleprompter Manhattan caused a sub-cable and related components to be attached to the said cable across the roof of said premises and caused such sub-cable to be dropped over the front of plaintiff's said premises from the roof (above the 5th floor of the premises) to the first floor of the premises in order to provide CATV services to a tenant of plaintiff of said premises. Said sub-cable was allowed to hang loose over the front of plaintiff's said premises but was attached to the front wall of said premises at the level of the first floor with a nail, brad, or other means of attachment. The sub-cable was drawn from the outside of the said premises into the apartment of the said tenant by means of a hole through the brick and stone front of the said premises which hole was caused to be drilled

by defendant Teleprompter Manhattan. The sub-cable was then caused to be attached to the interior walls of the said tenant's apartment by defendant Teleprompter Manhattan, by means of staples or similar means of attachment. Defendant Teleprompter Manhattan thereby mutilated and defaced plaintiff's property.

11. Defendant Teleprompter Manhattan committed all of the acts described in paragraph 9 and 10 without the consent of plaintiff and without compensating the plaintiff in any way or notifying plaintiff that it intended to make any such installation or had made any such installation on plaintiff's said premises. Defendant Teleprompter Manhattan has also from time to time entered plaintiff's premises without permission to sell, install and service the CATV system.

12. Upon information and belief, the methods described in paragraphs 9

through 11 are representative of the methods used by defendant Teleprompter Manhattan to install CATV components and provide CATV service on the real property of all of the members of the class represented by plaintiff.

13. The acts of defendant Teleprompter Manhattan herein complained of constitute trespasses upon the real property of the members of the class represented by plaintiff.

14. As a result of such trespasses plaintiff and the members of the class represented by plaintiff are entitled to damages based upon

(a) the actual damages suffered by plaintiff and the members of the class represented by plaintiff,

(b) the value to defendant Teleprompter Manhattan of the property rights of which defendant Teleprompter

Manhattan has and continues to avail itself,

(c) the mesne profits realized by defendant, Teleprompter Manhattan and

(d) any other appropriate measure of damages.

15. Plaintiff and the members of the class represented by such plaintiff have no adequate remedy at law to prevent defendant from continuing the acts complained of.

E. As and for her first Cause of Action against defendant Teleprompter, plaintiff alleges:

16. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 5 and 7 through 15 of this complaint.

17. On information and belief, at all times mentioned in this complaint, defendant Teleprompter has managed the operations of Teleprompter Manhattan and

has itself committed the acts complained of herein on the part of Teleprompter Manhattan.

F. As and for her second Cause of Action against defendant Teleprompter, plaintiff alleges:

18. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 5, 7 through 15, and 17 of this complaint.

19. On information and belief, defendant Teleprompter has aided and abetted, and conspired with defendant Teleprompter Manhattan in committing the acts complained of herein on the part of Teleprompter Manhattan.

G. As and for her third Cause of Action against defendant Teleprompter, plaintiff alleges:

20. Plaintiff repeats and realleges each and every allegation contained in

paragraphs 1 through 5, 7 through 15, 17 and 19 of this complaint.

21. On information and belief, defendant Teleprompter has constructed and maintained CATV systems elsewhere in New York State, including, without limitation, in and around the communities of Elmira, Islip, Jamestown, Mt. Vernon, Newburgh and Oswego.

22. In doing so, defendant Teleprompter has trespassed upon the real property of members of the class represented by plaintiff in like manner as is hereinbefore alleged with respect to defendant Teleprompter Manhattan.

23. As as result of such trespasses, plaintiff and the members of the class represented by plaintiff are entitled to damages as set forth in paragraph 14 but measured where appropriate by the benefits to defendant Teleprompter.

H. As and for her second Cause of Action against defendant Teleprompter Manhattan and her fourth Cause of Action against defendant Teleprompter, plaintiff alleges:

24. Defendants' CATV activities in the State of New York are regulated by the Commission pursuant to Executive Law Sections 811 through 831 (L. 1972 cc. 466, 467; L. 1974 cc. 87, 88, 441, 442, 528; L. 1975 cc. 35, 586) and rules and regulations of the Commission promulgated thereunder.

25. Defendants have committed some or all of the acts complained of herein under the purported authority of Executive Law Section 828(1)(b) and Part 598 of the Commission's Rules, rules and regulations of the Federal Communications Commission, and the police power inherent in the federal and state governments.

26. The acts of defendants complained of herein constitute a taking of property without just compensation, and a deprivation of property without due process of law, in violation of the constitutions of the United States and of the State of New York.

WHEREFOR plaintiff demands judgment:

A. Awarding damages to plaintiff and the members of the class represented by plaintiff, and against defendants.

B. Requiring defendants to account to plaintiff and the class represented by plaintiff for the mesne profits realized by defendants from the acts complained of.

C. Enjoining defendants from placing CATV components on any real property without the written consent of the owner.

D. Enjoining defendants to remove all CATV components from the real prop-

erty of plaintiff and members of the class represented by plaintiff who shall not have granted written consent to the placement of such components and to repair all damages done by the placement of such components.

E. Awarding plaintiff the reasonable costs and expenses of this action, including reasonable counsel fees.

F. For such other and further relief as may appear to this Court to be just and equitable.

Dated: New York, New York
January 26, 1976

[Subscription omitted in printing]

[TELEPROMPTER AMENDED ANSWER
SUPREME COURT NEW YORK COUNTY]
[Title omitted in printing]

Defendants Teleprompter Manhattan CATV Corp. ("Teleprompter Manhattan") and Teleprompter Corporation ("Teleprompter") as and for an Amended Answer to the Complaint herein, allege as follows:

1. Deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "1" of the Complaint.

2. Admit the allegations in paragraph "2" of the Complaint.

3. Deny the allegations in paragraph "3" of the Complaint.

4. Deny the allegations in paragraph "4(a)" through and including "4(f)" of the Complaint, except that plaintiff uses the definitions as set forth therein for the purposes of this lawsuit.

5. Deny the allegations in paragraph "5(a)" of the Complaint, except admit that plaintiff purports to bring this action pursuant to the statute referred to therein; and deny the allegations in paragraph "5(b)" thereof, except admit that plaintiff purports to bring this action on behalf of the class referred to therein; and further, deny the allegations in paragraphs "5(c)", "5(d)", "5(e)", "5(f)" and "5(h)" hereof, and deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "5(g)" thereof.

6. Answering paragraph "6" of the Complaint, defendants repeat and reallege each and every allegation herein responsive thereto.

7. Deny the allegations in paragraph "7" of the Complaint, except admit that Teleprompter Manhattan operates a community antennae television ("CATV")

system within certain specified geographic areas of the Borough of Manhattan pursuant to a franchise granted by the City of New York.

8. Deny the allegations in paragraph "8" of the Complaint.

9. Deny the allegations in paragraph "9" of the Complaint, except aver that Teleprompter Manhattan has lawfully and properly placed its cable television equipment upon the premises known as 303 West 105th Street, New York, New York.

10. Deny the allegations in paragraph "10" of the Complaint, except aver that Teleprompter Manhattan has lawfully and properly attached the "sub-cable" referred to therein upon the premises known as 303 West 105th Street, New York, New York, so that Teleprompter Manhattan can provide CATV service to the tenants of said premises.

11. Deny the allegations in paragraph "11" of the Complaint, except aver that Teleprompter Manhattan, from time to time, lawfully entered the premises referred to therein for lawful and proper purposes.

12. Deny the allegations in paragraph "12" of the Complaint.

13. Deny the allegations in paragraph "13" of the Complaint.

14. Deny the allegations in paragraph "14(a)" to and including "14(d)" of the Complaint.

15. Deny the allegations in paragraph "15" of the Complaint.

16. Answering paragraph "16" of the Complaint, defendants repeat and reallege each and every allegation herein responsive thereto.

17. Deny the allegations in paragraph "17" of the Complaint.

18. Answering paragraph "18" of the Complaint, defendants repeat and reallege each and every allegation herein responsive thereto.

19. Deny the allegations in paragraph "19" of the Complaint.

20. Answering paragraph "20" of the Complaint, defendants repeat and reallege each and every allegation herein responsive thereto.

21. Deny the allegations in paragraph "21" of the Complaint, except aver that wholly-owned subsidiaries of Teleprompter own and operate CATV systems in the communities referred to therein.

22. Deny the allegations in paragraph "22" of the Complaint.

23. Deny the allegations in paragraph "23" of the Complaint.

24. Admit the allegations in paragraph "24" of the Complaint.

25. Deny the allegations in paragraph "25" of the Complaint, except admit that defendants act in conformance with the Laws of the State of New York and the Rules and Regulations of the New York State Cable Television Commission.

26. Deny the allegations in paragraph "26" of the Complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

27. The Complaint herein fails to state a cause or causes of action upon which the relief requested therein can be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

28. The causes of action set forth in the Complaint herein cannot be properly maintained as Class Actions in accordance with Article 9 of the New York State Civil Pactice Law and Rules.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

29. The causes of action as set forth in the Complaint herein are barred

by the applicable Statutes of Limitations.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

30. The stringing of any wires across and attaching related materials to plaintiff's property, so as to provide cable television service to adjoining property or properties and/or one or more of plaintiff's tenants constitutes, at most, a minimal interference with (or taking of) plaintiff's property rights.

31. By virtue of the foregoing, plaintiff has suffered, at most, nominal damages.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

32. Any property allegedly taken by stringing wires and attaching materials to plaintiff's property has no value or nominal value to plaintiff.

33. By virtue of the foregoing, plaintiff has suffered, at most, nominal damages.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

32. To the extent that plaintiff's claim is based on the presence of components to provide cable television service for tenants in this building, the Cable Television Commission of the State of New York has adopted regulations establishing an administrative procedure whereby landlords can obtain compensation therefor.

35. Upon information and belief, plaintiff has failed to exhaust the administrative remedies provided by such procedure.

WHEREFORE, defendants Teleprompter Manhattan CATV Corp. and Teleprompter Corporation demand judgment dismissing the Complaint herein, together with the costs and disbursements of this action.

[Subscription omitted in printing]

[NEW YORK CITY ANSWER
SUPREME COURT NEW YORK COUNTY]
[Title omitted in printing]

The City of New York, by its attorney, W. BERNARD RICHLAND, Corporation Counsel, answering the Complaint herein:

* * *

7. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "7" of the Complaint, except admits that the City of New York has granted the defendant a franchise to operate a community antennae television ("CATV") system within certain specified geographic areas of the Borough of Manhattan.

* * *

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

27. The placing of the defendant's property on the plaintiff's building has

been authorized by Executive Law §828. The plaintiff is thereby precluded from seeking the relief requested in the Complaint.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

28. The Cable Television Commission of the State of New York has, pursuant to Executive Law §828(1), established an administrative procedure whereby landlords may receive compensation for the presence of cable television components on their property.

29. Upon information and belief, the plaintiff has failed to exhaust the administrative remedy established by the Cable Television Commission.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

30. The placing of defendant's property, on the plaintiff's building constitutes at most a minimal interference with plaintiff's property rights.

31. Thus, the plaintiff has suffered, at most, nominal damages.

[Demand for relief and subscription omitted in printing]

JtA32

TelePrompTer MANHATTAN CATV Cable TV

529 West 207th Street, New York, N.Y. 10034 (212) 942-7200

Thank you for permitting us to install our Community Antenna Television (CATV) service on the premises

_____ _____New York City

Street Address

The following is the basis on which it is mutually agreed that the installation will be made:

1. TelePrompTer was selected and is franchised by the City of New York to provide good TV reception for the residents of this area. The operation is regulated by the City of New York. The Federal Communications Commission also exercises control over Cable TV systems in its Second Report and Order.

2. The cable will not be in excess of one inch in diameter, will contain no hazardous voltages, will meet all governmental safety standards, and will not interfere with the occupancy or use of the building.

3. TelePrompTer shall have the exclusive privilege of offering and furnishing CATV or Cable TV service to occupants of the premises and TelePrompTer's representatives shall be permitted to enter the premises for such purpose and for the purpose of installing and maintaining, replacing, repairing or relocating any of its facilities.

4. TelePrompTer confirms that it has and will continue to maintain an insurance policy of $1,000,000.00 for personal injury or property damage that may arise from its installations and service.

5. TelePrompTer agrees that it will perform its work in a good and workmanlike manner and that any damage which occurs to the premises or its adjacent sidewalks by reason of the installation or maintainance of TelePrompTer's facilities will promptly be repaired to the reasonable satisfaction of the Landlord.

6. This agreement will continue for a period of five years and thereafter from year to year. After the initial five

year period, either party may terminate it upon written notice given no later than 90 days prior to the end of any contract year.

7. It is understood that all cable and other appliances installed by TelePrompTer shall remain its property and may be replaced and removed by TelePrompTer, from time to time, at its sole discretion. Landlord agrees to give TelePrompTer 90 days notice of any demolition or major repair or reconstruction planned by Landlord so that TelePrompTer may take appropriate steps to protect its facilities and assure the continuity of its service in the area.

8. This agreement will be binding on the parties, their successors and assigns. If Landlord transfers the premises, he shall notify the purchaser or transferee of this agreement and the transferee shall have the right, at any time within 6 months after the transfer, to terminate this agreement upon 90 days written notice to TelePrompTer.

9. In consideration of the Landlord's signing this agreement, TelePrompTer agrees to pay the then Landlord of the premises, annually, 5% of TelePrompTer's gross service income from occupants of the building who subscribe to its CATV System and remain subscribers for a period of one year or more.

10. TelePrompTer further agrees to pay to the Landlord a $5.00 one time payment for each tenant in said premises who subscribes to CATV for three (3) months or longer.

Please confirm the foregoing in the space provided below.

Very truly yours,

TELEPROMPTER MANHATTAN CATV CORP.

By_____

Installation agreed to
on the basis of the above:

By_____

STATE OF NEW YORK

COMMISSION ON CABLE TELEVISION

In the Matter of

Implementation of Section 828 of the Executive Law — Docket No. R.73-3

ORDER INSTITUTING PROCEEDING
(Issued May 25, 1973)

By the Commission:

Section 828 of the Executive Law expressly prohibits landlords from interfering with the installation of cable television facilities upon their property or premises. The same section also prohibits landlords from demanding or accepting payment from any cable television company, in exchange for permitting cable television service on or within the landlord's property or premises, "in excess of any amount which the Commission shall, by regulation, determine to be reasonable." These provisions, which have been

in effect since January 1, 1973 (the effective date of Article 28 of the Executive Law), clearly entitle cable television companies to install and operate their facilities upon rental properties and premises without landlord interference and, in view of the absence of any Commission regulation prescribing a reasonable fee, without payment of any amount to the landlord of any such property or premises.

No person or organization has requested us to adopt a regulation establishing a reasonable fee. However, we believe it appropriate, in implementing Section 828, to seek the views of interested parties as to whether fees may and/or should be charged by landlords in exchange for permitting cable television service on or within rental properties and premises and, if so, what fee or fees would be reasonable. We therefore have

determined to institute a proceeding, on our own motion, to inquire into these matters. Initially, we will solicit written comments with regard to the questions indicated above. If the written comments do not provide a sufficient basis for Commission action, we will order such further proceedings as may be appropriate.

We are causing a copy of this order to be served on all cable television companies in the State, on a number of associations representing landlords and property owners, and on other persons and organizations who have expressed an interest in the activities of this Commission. In addition, we are causing notice of the institution of this proceeding to be published in a number of newspapers, as well as in our weekly bulletin.

For the foregoing reasons, THE COMMISSION ORDERS:

1. A proceeding is hereby instituted to consider the questions specified in the text of this order.

2. Any interested person or organization may file written comments, addressed to the questions specified in the text of this order, by not later than June 29, 1973. Replies to the initial comments of other persons and organizations may be filed by not later than July 20, 1973. An original and ten copies of all such comments and replies should be submitted. All comments and replies will be placed in a public file and may be inspected at the offices of the Commission in the Alfred E. Smith State Office Building, Albany, New York, during normal business hours.

Commissioners participating: C. Lynn Wickwire, Acting Chairman; Jerry A. Danzig, Vice Chairman; Michael H. Prendergast; Eli Wager; Edward J. Wegman, Commissioners.

STATE OF NEW YORK

COMMISSION ON CABLE TELEVISION

In the Matter of Application of Irving Kissin for a determination of a reasonable fee pursuant to Section 828 of the Executive Law	)	Docket No. 80150

ORDER APPROVING FEE
(Issued: January 15, 1976)

On October 17, 1975 we received from Irving Kissin an application, pursuant to Section 828 of the Executive Law and Part 598 of our Rules, requesting our determination of reasonableness for a fee to be paid by Manhattan Cable Television, Inc. ("MCTV") for the right to provide cable service to Mr. Kissin's tenants at 44 East 75th Street, New York City.* A copy

* Section 828(1)(b) of the Executive Law provides as follows:

(Footnote continued on next page)

of the Application was served upon all tenants in the building, upon MCTV and upon the City of New York, and notice was published in our weekly bulletin. No objections have been received.

The application, which is in proper form and complies with the requirements of Part 598 of our Rules,* discloses that the subject apartment building contains five apartments, the tenants of

(Footnote continued from preceding page)

> "1. No landlord shall. . . b. demand or accept payment from any tenant, in any form, in exchange for permitting cable television service on or within his property or premises, or from any cable television company in exchange therefor in excess of any amount which the commission shall, by regulation, determine to be reasonable."

* Section 598.3 of our Rules requires an application for the determination of a reasonable fee to be made by the later of December 30, 1973 (60 days following the effective date of Part 598) or 60 days after cable service is commenced in the premises. Cable service to the subject building began in mid-1972, and the applicant has accordingly requested waiver of the Section 598.3 deadline. The request is unopposed and we shall grant it.

three of which subscribe to MCTV's services. Appended to the application is a detailed description of MCTV's installation, consisting of approximately 268 feet of cable, one splitter, one terminator, three matching transformers and six converters. The transformers and converters are located in the subscribers' apartments; the remaining equipment is said to occupy space for which the landlord did not have a previous use.

The fee for which a determination of reasonableness is sought is a one-time payment of $1.00. MCTV, which appears to have been associated with the preparation and submission of the application, has endorsed the application and has filed a legal memorandum in its support as well as an appraisal report prepared at MCTV's request. The gist of MCTV's legal memorandum is that in determining reasonable fees pursuant to Section 828 of the

Executive Law, we should apply the principles of the Condemnation Law. The appraisal report, prepared by James D. Landauer Associates ("Landauer"), concluded that the market value of the 20.938 square foot easement used by MCTV for the purposes of providing cable television service to the tenants of the building, as of April 19, 1972, was nominal.*

Section 828(1)(b) of the Executive Law prohibits payments to landlords by cable television companies in excess of any amount we determine to be reasonable. Accordingly, we could easily dispose of the present case by simply holding that a one-time payment of $1.00 clearly does not exceed whatever fee may ultimately be

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* April 19, 1972 was the date on which the cable installation was completed. We have received no indication that the value of the easement has since changed.

found to be reasonable. Moreover, if it were determined that no fee is reasonable, a one-time payment of $1.00 is de minimis and it would be pointless to oppose it. Disposition of the case on this basis would permit us to avoid consideration of the legal analysis and appraisal submitted by MCTV.

Nevertheless, for reasons discussed more fully in the Statement of General Policy we are issuing today, we are persuaded by MCTV's contention that condemnation principles should govern the disposition of cases arising under Section 828 of the Executive Law. Moreover, in the present case, there has been no challenge to the expert appraisal prepared by Landauer. Accordingly, we are prepared to decide the present case on the broader ground that, in the circumstances presented, a nominal payment is, indeed, reasonable, and that any greater

payment would be barred by Section 828.

THE COMMISSION ORDERS:

The application of Irving Kissin for a determination of the reasonableness of a one-time fee of $1.00 to be paid by Manhattan Cable Television, Inc. for the right to provide cable television service to the tenants at 44 East 75th Street, New York City, is hereby granted.

Commissioners Participating: Robert F. Kelly, Chairman; Jerry A. Danzig, Vice Chairman; Michael H. Prendergast; Eli Wager; Edward J. Wegman, Commissioners.

STATE OF NEW YORK

COMMISSION ON CABLE TELEVISION

In the Matter of	)	
	)	Docket No. 90004
Implementation of	)	
Section 828 of the	)	(Renumbered from
the Executive Law	)	R.73-3)

STATEMENT OF GENERAL POLICY
(Issued: January 15, 1976)

Section 828(1)(b) of the Executive Law provides that no landlord may "demand or accept payment from any tenant, in any form, in exchange for permitting cable television service on or within his property or premises, or from any cable television company in exchange therefor in excess of any amount which the commission shall, by regulation, determine to be reasonable." Among the early activities undertaken by this Commission was the institution of a proceeding, on May 25, 1973, concerning the implementation of

the forgoing provision. Comments were filed in that proceeding on behalf of cable television companies and real estate interests and, on October 29, 1973, we issued an order adopting Part 598 of our Rules governing applications by landlords pursuant to Section 828(1)(b).*

In our October, 1973 order, we noted that "virtually nothing in these comments [filed by landlords] would support the imposition of any particular fee or schedule of fees." Accordingly, we reached two conclusions. First, without foreclosing the possibility that a fee might be reasonable in some cases, we decided that, for the time being, landlords should be barred from imposing any fee in exchange for permission to wire apartment buildings or any other rental

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* Implementation of Section 828 of the Executive Law, Order Adopting Regulation, October 29, 1973.

premises.* (In this regard, we also noted that the Section 828 prohibitions against landlord interference were self-executing.**) Second, we concluded that the establishment of landlord fees should be done, as a rule, on a case-by-case basis and that in each instance the landlord would be required to submit the type of documentation described in Section 598.4 of our Rules.***

Since Part 598 was promulgated, we have received from landlords approximately 160 applications, complying in varying degrees with the requirements of Part 598. To date, we have ruled on none of these applications, however, having found little to guide us in fixing particular fees. Given this sparse

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* Id., at 4.

** Id., at 1.

*** Id., at 4.

guidance, and with due regard to the statutory intent underlying Section 828, we have now determined to adopt certain presumptions concerning reasonable landlord fees and have today issued our first decision under Section 828.*

We note at the outset that the purpose of Section 828 of the Executive Law is to assure that tenants have access to cable television service on the same footing as do individual homeowners. The issues involved in assuring this type of access were succinctly described by then Public Service Commissioner William K. Jones in his 1970 report on cable television regulation:

> State legislations should make it clear that landlords have no standing to impede the delivery of CATV services to their tenants. Landlords may insist that the CATV operation (or tenant) bear the

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* Application of Irving Kissin, Order Approving Fee, January 15, 1976. [Date corrected based upon published addendum.]

entire cost of the installation; that the installation conform to such reasonable requirements as the landlord may impose to protect the safety, operation or appearance of his building; and that the CATV operator (or tenant) agree to indemnify the landlord for any damage incurred by the installation. Beyond this, the landlord has no legitimate interest. The tenant, on the other hand, has as much interest in receiving CATV services as he has in receiving mail, telephone communications, or over-the-air television signals. And landlord impediment to the extension of CATV service is disadvantageous not only to the personal interests of tenants, but to the development of the CATV industry. . . .

This proposal involves some intrusion upon the property interest of the landlord. But the interest intruded upon is a wholly abstract one--given the conditions specified, the landlord's interest consists entirely of insisting that some negligible unoccupied space remain unoccupied. The tenant's interest clearly is more substantial, consisting of a right to receive (and perhaps send) communications from and to the outside world. In the electronic age, the landlord should not be able to preclude a tenant from obtaining CATV service (or to exact a surcharge for allowing the service) any more than he could preclude a

> tenant from receiving mail or telegrams directed to him.*

The various legislative proposals culminating in Article 28 of the Executive Law included provisions implementing Commissioner Jones' recommendation on this issue; Article 28 of the Executive Law as eventually enacted included such a provision but that provision was tempered by the amendment establishing the reasonable fee jurisdiction of this Commission.**

In view of the policy embodied in Section 828 of the Executive Law, it appears that the likely purpose of the reasonable fee provision thereof was to assure that Section 828 did not subject landlords to potentially unconstitutional

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* W.K. Jones, Regulation of Cable Television by the State of New York, at 206-207 (1970).

** L.1972, c.467, § 7. Other states have enacted similar statutes without reasonable fee provisions. Cf., e.g., Conn. Public Act 75-301 (1975); Mass. Gen'l. Laws, c.166A, § 22 (1975).

takings of their property without just compensation. Cable television companies in New York State are incorporated pursuant to the Transportation Corporations Law and may well have powers of condemnation pursuant to Section 27 of that law. In the absence of legislative history demonstrating any intent to award greater fees to landlords, we shall construe the reasonable fee provision of Section 828 of the Executive Law to assure that a landlord is not deprived, by reason of a cable television company's assertion of its Section 828 rights, of the right to compensation with which the condemnation procedure of the Transportation Corporations Law would provide him.

In view of the foregoing, we have determined that Section 828(1)(b) of the Executive Law should be read to prohibit the payment of a fee, in exchange for access by a cable television company to

the premises, in excess of the award to which a landlord would be entitled in the event the cable television company were to proceed in accordance with the Condemnation Law. A condemnation-type appraisal was submitted to us in connection with the case we decided today,* and it expresses the opinion that the easement used by the cable television company to provide cable service to the premises in question is nominal in value.** While the case decided today involves a small, five-apartment building, Manhattan Cable Television, Inc. has also submitted an appraisal of the easement it uses to supply service to a 200-unit building and that appraisal, as

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* Application of Irving Kissin, supra.

** The appraisal was prepared by James D. Landauer Associates, Inc. It concludes that the value of the 20.938 square foot easement taken was nominal, and that severance damages, on balance, were non-existent.

well, concludes that the value of the subject easement is nominal.* We are satisfied that, in the circumstances described by the appraisals submitted to us, the value of the easement used to provide cable service is nominal.** We also believe these circumstances to be typical and, therefore, we have determined that in the absence of a special showing of greater damages attributable to the taking, the only fee that is reasonable under Section 828(1)(b) of the Executive Law is a nominal one.

It is important for us to note the limitations of today's determination,

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* This appraisal was also prepared by James D. Landauer Associates, Inc. It concludes that the value of the 304.66 square foot easement taken was nominal and that severance damages, on balance, were non-existent.

** In this regard, we stress that we believe that our charge pursuant to Article 28 of the Executive Law is to fix the lowest possible fee that would assure the constitutionality of Section 828.

which is intended to address only the situation in which a cable television company enters a building for the purpose of providing cable television service to the residents of that building. Today's holding does not, therefore, apply to a situation in which a cable television company seeks to cross particular property for the purpose of serving adjoining property. It does not apply to situations in which equipment is installed in a particular building to serve subscribers residing in neighboring buildings. It does not limit a landlord's rights under clauses i, ii and iii of subdivision (1)(a) of Section 828 of the Executive Law.* Finally, it does not apply to voluntary agreements pursuant to which the landlord is to supply significant services or cooperation to the cable

* [Footnote quoting Section 828(1)(a) omitted in printing.]

television company as well as access to the premises.

In view of the importance of today's determination, we shall extend the usual 20-day period for the filing of petitions for reconsideration* and shall permit all interested parties to comment on and request modification of this statement of general policy until March 10, 1976. A copy of this statement of general policy will be served upon each landlord who has submitted an application pursuant to Section 828 of the Executive Law and each such landlord will also be given until March 10, 1976 to modify his application to include a showing that the standards announced today would result in the approval of a fee in excess of a nominal one. Thereafter, we shall consider all

* Section 590.19(a) of our Rules.

comments received, shall make any appropriate modifications in the policy we are today announcing, and shall proceed to dispose of the landlord fee applications now before us.

Commissioners Participating: Robert F. Kelly, Chairman; Jerry A. Danzig, Vice Chairman; Michael H. Prendergast; Eli Wager; Edward J. Wegman, Commissioners.

STATE OF NEW YORK

COMMISSION ON CABLE TELEVISION

In the Matter of	)	
	)	Docket No. 90004
Implementation of	)	
Section 828 of the	)	(Renumbered from
the Executive Law	)	R.73-4)

CLARIFICATION OF GENERAL POLICY
(Issued: August 27, 1976)

On January 15, 1976, our Commission issued a Statement of General Policy ("Statement"), with respect to Section 828 of the Executive Law and the issue of landlord-tenant relationships. The Statement (1) construed the reasonable fee provision of Section 828 of the Executive Law to assure that a landlord is not deprived, by reason of a cable television company's assertion of its Section 828 rights, of the right to compensation with which the condemnation procedure of the Transportation

Corporations Law would provide him; (2) determined that Section 828(1)(b) of the Executive Law should be construed to prohibit the payment of a fee, in exchange for access by a cable television company to the premises, in excess of the award to which a landlord would be entitled in the event the cable television company were to proceed in accordance with the Condemnation Law; (3) determined that, in the absence of a special showing of greater damages attributable to the taking, the only fee that is reasonable under Section 828(1)(b) of the Executive Law is a nominal one; and (4) determined that Section 828(1)(b) should apply only to the situation in which a cable television company enters a building for the purpose of providing cable television service to the residents of that building.

The usual 20-day period for filing petitions for reconsideration and for permitting all interested parties to comment on, and request modification of, the Statement was first extended to March 10, 1976, and, subsequently, to April 12, 1976. A copy of the Statement was served by mail upon each landlord who had submitted an application pursuant to Section 828 of the Executive Law, and each such landlord was given until April 12, 1976, to modify his application to include a showing that the standards announced in the Statement of General Policy would result in the approval by the Commission of a reasonable fee in excess of a nominal fee. Finally, in the Statement, the Commission stated that it would consider all comments received and make any appropriate modifications in the policy announced.

Comments were received from the New York State Cable Television Association ("Association") and from Manhattan Cable Television Inc. ("MCTV").

The comments requested clarification in the following areas:

1. a clarification of which party has the burden of proof to demonstrate that a landlord is entitled to more than nominal damages "for permitting cable television service on or within his property or premises;"

2. a clarification of the definition of a reasonable fee (nominal amount) pursuant to Section 828(1)(b) of the Executive Law and the Statement to mean a one-time payment of $1.00;

3. a clarification of the definition of the word "significant" as the same was used in the Statement in determining that the nominal payment to a landlord "for permitting cable television

service on or within his property or premises does not apply to voluntary agreements pursuant to which the landlord is to supply significant services or cooperation to the cable television company as well as access to the premises," or alternatively, a request that the Commission indicate a willingness to issue advisory opinions when questions in this area arise;

4. a request for further clarification of the acceptability of the voluntary agreements between MCTV and The Real Estate Board of the City of New York;

5. a request that the Commission reconsider the exemption from the Statement (p. 4) relative to the situation where a cable television company seeks to cross particular property for the purpose of serving adjoining property, and interpret this exemption to apply only "to empty buildings, vacant lots and the

like" and not a situation where the cable company seeks to exit a building that it serves;

6. a request that the Commission make a determination that an amplifier installation is a part of a cable television facility in a situation where the amplifier is situated on particular property for the purpose of serving adjoining property;

7. a request that the Commission take a vigorous role in enforcing a cable television company's Section 828 right of access, including, where appropriate, institution of legal proceedings against those landlords who refuse to permit cable television service to tenants in said landlords' buildings.

After carefully examining and considering the various issues raised in comments filed we have determined that no material modification of the Statement

issued January 15, 1976 is necessary. However, we feel that certain questions raised in the comments filed as well as certain issues raised by landlords' filings merit our further comment.

The Statement (p. 4) clearly states that "in the absence of a special showing of greater damages attributable to the taking, the only fee that is reasonable under Section 828(1)(b) of the Executive Law is a nominal one." Part 598.2 of the Commission Rules provides that "a landlord shall be entitled to the payment of a reasonable fee, pursuant to Section 828(1)(b) of the Executive Law, upon Commission approval of an application for such fee." Part 598.4 of the Commission Rules states that "such application shall set forth specific facts justifying a fee." While the Statement construes the the reasonable fee provision of Section 828 of the Executive Law to assure that a

landlord is not deprived (by reason of the cable television company's assertion of its Section 828 rights) of the right to compensation with which the condemnation procedures of the Transportation Corporations Law would provide him, the landlord, nevertheless, pursuant to Part 598 of the Commission Rules, is still required to present specific facts to justify a fee.

The Statement (p. 4) states that the reasonable fee for access does not apply to "voluntary agreements pursuant to which the landlord is to supply significant services or cooperation to the cable television company as well as access to the premises." The Statement vis-a-vis a landlord has application only to "permitting cable television service on or within his property or premises." In this regard, we believe the Statement is self-explanatory. The form agreement

between MCTV and The Real Estate Board of the City of New York, as well as any other voluntary agreement between a landlord and cable television operator that imposes an obligation upon the landlord, involves more than merely "permitting cable television service"; accordingly, such voluntary agreements are outside the scope of Section 828 of the Executive Law and Part 598 of the Rules of this Commission.

Upon request, we will continue to issue advisory opinions with respect to the interpretation and application of the Rules of this Commission in appropriate situations.

In the many filings by landlords with the Commission in this area, a number of questions have arisen that appropriately require comment by us at this time.

To repeat, Section 828(1)(b) is limited to the question of permitting cable television service on or within a landlord's property or premises; and, it, together with Part 598, limits the damages permitted to be determined thereunder to this area only.

The Section 828(1)(b) rights granted a landlord are separate and distinct from the right of access conferred by Section 828(1)(b). Accordingly, the statutory rights granted to landlords under Section 828(1)(a) involve matters concerning which this Commission has no obligation to enforce, but rather involve matters that should be resolved or adjudicated by the parties themselves. The statutory obligation of this Commission under Section 828 is limited solely to a determination of a reasonable fee to the landlord for permitting cable television service to tenants on or

within the landlord's property or premises.

The statutory rights granted the landlord under Section 828(1)(a) afford the landlord the following rights:

[Quotation of statute omitted in printing].

Thus, any alleged damage to the landlord's property or premises by reason of actions of the cable television company as to the matters set forth in Section 828(1)(a)(i), (ii) and (iii) involve matters to be resolved or adjudicated between the landlord and the cable television operator (and tenant, where applicable).

Finally, Section 828(2) provides that "[r]ental agreements and leases executed prior to the effective date of this article may be enforced notwithstanding this section." This section has application only to agreements and leases

between a landlord and a tenant. The issue of the continued enforceability of agreements and leases between landlords and cable television companies entered into prior to January 1, 1973 is not addressed in Section 828(2) or elsewhere in Article 28 of the Executive Law. In view of this, we have determined that any such agreement is a contractual matter to be resolved or adjudicated between the parties. However, a renewal of any such agreement after January 1, 1973 is subject to the limitations imposed by Section 828(1)(b) and this Commission's Statement of General Policy defining a reasonable fee for permitting cable television service on or within his property or premises.

Accordingly, if a contract or agreement between a landlord and a cable television company involves any service over and above access to the building or

premises served, such matters or claims of matters would be adjudicated between the landlord and the cable television company pursuant to statutory rights granted the landlord under Section 828(1)(a) or pursuant to contract law.

By today's ruling, we determine that a reasonable fee pursuant to Section 828(1)(b) of the Executive Law, absent a special showing of greater damages attributable to the taking, is a payment of a one-time, $1.00 fee. We reiterate that such one-time $1.00 fee constitutes a reasonable fee pursuant to Section 828(1)(b) of the Executive Law for permitting cable television service (which includes running the necessary cable wiring into the tenant's apartments, so that the tenants can receive cable television service) on or within a landlord's property or premises.

We make it clear that we do not forbid a payment by a cable television company of a higher fee to a landlord for other services over and above access to the landlord's premises.

In view of today's determination, any landlord who, has submitted an application for a reasonable fee pursuant to Section 828 of the Executive Law or any landlord who has heretofore made a filing with this Commission for a fee pursuant to Section 828 of the Executive Law will be given until September 10, 1976 to modify his application or filing to include a special showing by him that he is entitled to a fee in excess of a one-time $1.00 payment.

Commissioners Participating: Robert F. Kelly, Chairman; Jerry A. Danzig, Vice-Chairman; Michael H. Prendergast; Edward J. Wegman, Commissioners.

STATE OF NEW YORK

COMMISSION ON CABLE TELEVISION

In the Matter of	)	
	)	Docket No. R. 73-3
Implementation of	)	
Section 828 of the	)	
the Executive Law	)	

JOINT COMMENTS OF THE NEW YORK STATE CABLE TELEVISION ASSOCIATION, STERLING COMMUNICATIONS, INC., TELEPROMPTER CORPORATION AND VIACOM INTERNATIONAL, INC.

[List of counsel omitted in printing]

August 15, 1973

* * *

[2] Sterling is also an interested party in this proceeding in that through a wholly owned subsidiary, Sterling Manhattan Cable Television, Inc., it operates cable television systems in the lower half of Manhattan and is developing several franchises in Nassau and Suffolk counties, Long Island. Sterling has experienced difficulty in obtaining permission to wire some thousand dwelling units

in Manhattan. By the same token, Tele-PrompTer is an interested party in that through affiliated corporations it operates systems in the following communities where it has experienced difficulty in obtaining permission to wire dwellings: TelePrompTer Manhattan CATV Corp., Manhattan, 240,000 dwelling units not being served; TelePrompTer County Cable TV Corp., Mr. Vernon, 9,000 dwelling units not being served; TelePrompTer Island Cable TV, Islip, 2,000 dwelling units not being served. Finally, Viacom is an interested party in that through subsidiary corporations it operates systems in Brookhaven, Islip, North Haven, Shelter Island and Smithtown where it has experienced difficulty in obtaining permission to wire several dwelling units. Using a conservative census multiple of

2.5, it is seen that at least 627,500 persons have been unable to receive cable television service.

[The foregoing is objected to by Appellant as hearsay. It was not adverted to below and, therefore, no ruling was sought. The document was offered by Appellant for admissions as to legislative history and other matters.]

* * *

[8] In Chairman Swidler's letter to Governor Rockefeller dated December 31, 1980, at page 9 he summarized Commissioner Jones' recommendations as follows:

"I. Landlord-Tenant Problems

Landlord shall be prohibited from:

(1) Interfering with CATV installations desired by a tenant, as long as the above conditions of cost, landlord specifications, and indemnifications are met.

(2) Accepting payment either from operators or from tenants to permit service in his building.

(3) Discriminating in rental charges between tenants receiving CATV service and those not receiving service.

Operators should also be prohibited from making payments to landlords and

from discriminating in charges between tenants and homeowners similarly situated." (emphasis supplied).

Commissioner Jones' recommendations were reflected in Assembly Bill 7809, Governors Program Bill, 1971, which proposed to amend the public service law in relation to the regulation of cable television companies. Section 157 of that Bill provided:

"§157. Landlord-tenant relations. 1. No landlord shall

a. interfere with the installation of facilities upon his property or premises;

b. demand or accept payment, in any form, in exchange for permitting catv service on or within his property or premises; or

c. discriminate in rental charges, or otherwise between tenants who receive catv service and those who do not; provided, that a landlord may require:

i. that the installation of facilities conform to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises, and the convenience and well-being of other tenants;

ii. that the catv company or the tenant bear the entire cost of the installation, operation or removal of such facilities; and

iii. that the catv company and the tenant agree to indemnify the landlord for any damage caused by the installation, operation or removal of such facilities.

2. Rental agreements and leases executed prior to July thirty-one, nineteen hundred seventy-one may be enforced notwithstanding this section."

* * *

PROPOSED RULES IMPLEMENTING
SECTION 828 OF THE EXECUTIVE LAW

* * *

I.2 - No landlord shall:

* * *

(b) Demand or accept payment from any cable television company in exchange for permitting cable television service on or within his property or premises except that the landlord may make a reasonable charge in the case of substantial real property occupancy by the cable television company. Examples of

substantial real property occupancy are as follows:

> Location of major facilities such as cable television distribution centers ("head end" antennas), studios, and microwave units occupying space of significant size and involving the installation of some permanent fixtures not easily relocatable or removable.

Substantial shall not be deemed to include routine passage of cable facilities (cable, strand, cable hardware or supplies, amplifiers, bridgers, line extenders, power supplies, converters and related equipment) on property in order to serve the residents thereof, or to reach adjoining property;

* * *

[TELEPROMPTER MEMORANDUM
ANNEXED TO JOINT COMMENTS]

* * *

Cable television facilities located on private property consist of two completely different types of installations: (i) the routine wiring of a building for

the purpose of providing service to persons residing in such building and in some cases to pass through to adjoining property in order to service adjoining property, etc., (ii) location of major facilities such as "head end" antennas or microwave units occupying special space of significant size and involving the installation of some permanent fixtures not easily relocatable or removable.

It is respectfully submitted that the Commission should adopt regulations finding that a charge is "reasonable" only in the case of substantial real property occupancy of the second type set forth above. There should not be any payment whatever to landlords for the routine passage of cable facilities on property in order to serve the resident thereof or to reach adjoining property.

* * *

[SCHEDULE 4 TO JOINT VENTURE AGREEMENT AMONG TELEPROMPTER, THETA CABLE OF CALIFORNIA AND HUGHES AIRCRAFT COMPANY, JANUARY 1977]

* * *

2. Litigation or Claims Relating to Teleprompter Manhattan

* * *

(c) Other Possible Landlord Problems. It is possible that a suit could be brought on behalf of those New York City landlords with whom Teleprompter Manhattan entered into contracts which granted Teleprompter Manhattan permission to enter their buildings in order to install equipment to enable subscribers to receive cable television service. Under those contracts, Teleprompter Manhattan agreed to pay the landlords a fee (generally 5% of the revenues derived from the landlord's building). Teleprompter has not paid these landlords the fees called for by their contracts since mid-1974.

* * *

[DEPOSITION of JEAN A. LORETTO,
January 11, 1977]

[Title and introductory
material omitted in printing]

* * *

[17-20] Q [By MR. LESCH] for Teleprompter] Is this building owned in your name or in the name of the corporation? A It is in the name of a corporation right now.

Q What is the name of the corporation? A Hargate.

Q Is that Hargate, Inc., or Hargate Corporation, or Hargate, Limited? A No, it's a real corporation.

Q What is the full name of the corporation, if you know? A Hargate Realty Corporation.

Q When was that entity incorporated? A Early in this year, and I would like to explain why, which I think is pertinent.

Q You certainly may explain why, if your attorney will permit you to. Mr. Gruen seems to be worried about that.

(Off the record discussion between Mr. Gruen and his client.)

Q Would you like to explain why Hargate Realty Corporation was incorporated?

MR. GRUEN: I think the question is irrelevant, but go ahead and answer it.

A You know that New York City is red-lined, no one can get mortgages. The only way you can get a mortgage in this city is that the banks force you to put the name of the building into corporation so they can charge you a higher interest rate. That is what they are doing on residential buildings that have income.

Q So you do not at present own the property at 303 West 105th Street?

A But I am the president of the corporation.

MR. LESCH: Off the record.

(Discussion off the record.)

BY MR. LESCH:

Q I take it that it is correct that you do not presently own the property at 303 West 105th Street? A That's correct.

Q Do you own all the stock of Hargate Realty Corporation? A Yes, I do.

Q Who are the officers of Hargate Realty Corporation? A Myself.

Q You are the president? A That's right. And I think my lawyer.

Q Is that Mr. Gruen? A No. On real estate I only use real estate lawyers. To tell you the truth, it's either one or two lawyers in the law firm that I used to close the title. I can give you both names, if you want.

Q Please do. A Katherine Trum or Peter Dwyer of Corner, Finn, Dwyer & Charles, 32 Court Street in Brooklyn.

Q One of these two people is the vice-president is that right? A I really don't know. They could be secretary-treasurer.

Q Are there any other officers of Hargate Realty Corporation? A No.

Q When was the property transferred to Hargate? A Eight or nine months ago, maybe. I'm sorry, but I was not prepared to answer questions like this. I thought I was going to talk about cables that are stapled to my house.

MR. GRUEN: Just answer as best you can. If you don't remember exactly, all you have to do is say so.

Q Approximately eight or nine months ago? A I could give you the date if I could look at the papers.

Q Do you have any papers with you that would refresh your recollection? A No, not about my house.

Q Who owned the property prior to Hargate Realty Corporation? A Jean Loretto.

Q How long did you own that property? A About six and a half years.

Q Do you remember the month and year in which you acquired it? A March last, I think. March, probably '71, maybe '70, I'm not sure.

* * *

[32-39] Q [By MR. LESCH] Were there any cable TV components installed at the time you acquired the building? A I did not see any.

Q That is not my question. Maybe your answer will be the same, I don't know, but whether or not you saw them at the time you purchased the building, were

there such CATV components on the building at the time you acquired it?

MR. GRUEN: You answer that as best you can, based on your five senses.

A I did not see any, and I inspected the building.

Q Did there come a time when CATV components were placed on the buildings? A That is true.

Q When was that? A The first one that I can remember was three years ago.

Q That would be in 1974? A January, 1974.

Q Will you tell us what you saw and what happened in connection with those components being placed on your building? A I saw a cable coming down from the roof with heavy staples into the stone, down the front of the building. It entered into the first floor front apartment through a hole that had been drilled.

Q And you first saw that in January, 1974? A That's right, that is the first time.

Q What is the name of the owner into whose apartment that cable went?

MR. GRUEN: Objection.

Q Excuse me, the tenant. A The tenant was Roy Black.

Q Does Mr. Black still occupy that apartment. A No, he does not.

Q What is the name of the present tenant? A Anthony Brescia.

Q What is the number of the apartment? A 1A.

Q What did you do after you saw that cable as you have just described it? A I complained to the tenant.

Q You complained to Mr. Black? A Yes.

Q What did you say to him? A I asked him why he didn't tell me what he was drilling through my building for.

And he said he didn't do it. He had subscribed to cable TV, and this was the way they do it.

Q What did you do then? A At that time I didn't do very much, just felt very bad.

Q Did you call up Teleprompter and tell them what you objected to this? A No, not at that time.

Q Did there come a time when you did call up Teleprompter and tell them you objected to that? A Yes, there was a time I did call.

Q When was that? A It seemed to me it was warm weather, and it was June, but I can't even--probably it was June of that year.

Q You would say June of 1974? A I would guess so.

Q Who did you speak to at Teleprompter? A Their uptown office, the

person in charge of installation is on 105th Street.

Q What was the name of that persons? A I don't recall.

Q After you spoke to him, did you write him a letter? A Yes, then there was a letter written. That was when I started to get into it.

Q Was that the letter you previously described or was that a different letter? A I feel there were two letters, one from me, individually, and one from the block association as the president.

Q The one from the block association related to the aesthetics, if you will, of having wire in front of the building? A Some buildings have seven and eight cables.

Q Was this one that you are describing related particularly to your objection to the installation of the cable;

is that right? A That is true.

MR. LESCH: May we have a copy of that letter?

MR. GRUEN: Yes, if we can find it.

A That would be at the time I started talking to my--

Q Was the addressee of that letter the same person you had spoken to on the telephone? A I think one was the addressee and I think the second one was to the president.

Q To the president? A I think so.

Q When you say the second one, is that the one you wrote as the block association president? A Yes.

Q So the other letter was addressed to the person with whom you actually spoke? A That's right.

Q Do you know whether any of the tenants in your building are presently subscribers to the cable television

services of Teleprompter? A I think two are.

Q What are their names? A I think Tony Brescia has connected, I'm not sure. I could ask him.

Q What is the name of the other person whom you think is a subscriber? A The other one is either of two people. Isn't this awful; I don't know. It's either Richard Deane or Steven Berkowitz.

Q What are the apartment numbers of Messrs. Deane or Berkowitz? A Richard Deane is 3A, Berkowitz is 5B.

Q Will you ascertain which of these individuals has the CATV? A Sure, I will.

Q Will you also tell me when this second installation of CATV was made? A I don't know. You know by the time you see it, because I don't go in the backyard all the time, so--

MR. GRUEN: I am going to object to Mrs. Loretto going out and finding out which of the tenants has CATV installations, because it is information that is within the knowledge of the defendants at the moment. And I don't think there is any reason to burden Mrs. Loretto with that.

Q Mrs. Loretto, will you produce for us the leases that you have with individuals in your building whom you have just named. A Sure.

Q Is the building under rent control? A No.

Q Mrs. Loretto, let me show you something. This is a copy of the complaint that was filed on your behalf by your attorney, and I direct your attention to paragraph 9 which says, and I quote, "In particular, in or about 1972, defendant Teleprompter Manhattan

placed a CATV cable on the roof of premises 303 West 105th Street, in the City and County of New York, owned by plaintiff." Does that refresh your recollection that the cable was initially placed on your building in 1972, rather than 1974? A We are talking about different kinds of cables. The cable television runs across all of the roofs on the block. Even if a building has no cable TV in it, it could have a cable running across it, because it is reaching to the other buildings. What I saw would have been the feeder cable coming down into the apartment. But the roof cable is a different cable. It is much fatter and everything else. It has a mechanism attached to it.

Q When did you first see the roof cable? A In '72. At least that is what--it has a big silver box attached to it.

Q And you first saw the silver box in 1972, also? A That is when I first--

Q And at that time you didn't make any complaint to Teleprompter, is that right? A No, not until later.

Q The first time you made a complaint was sometime after you saw the feeder wire going into Mr. Black's apartment? A That's right.

* * *

[45-74] Q [By MR. LESCH] Did you ever have any conversations with Teleprompter Manhattan or Teleprompter with respect to CATV?

MR. GRUEN: Other than than those to which she's already testified?

Q You have mentioned that one conversation in which you complained. Aside from that one conversation, have you ever spoken to anyone at Teleprompter or

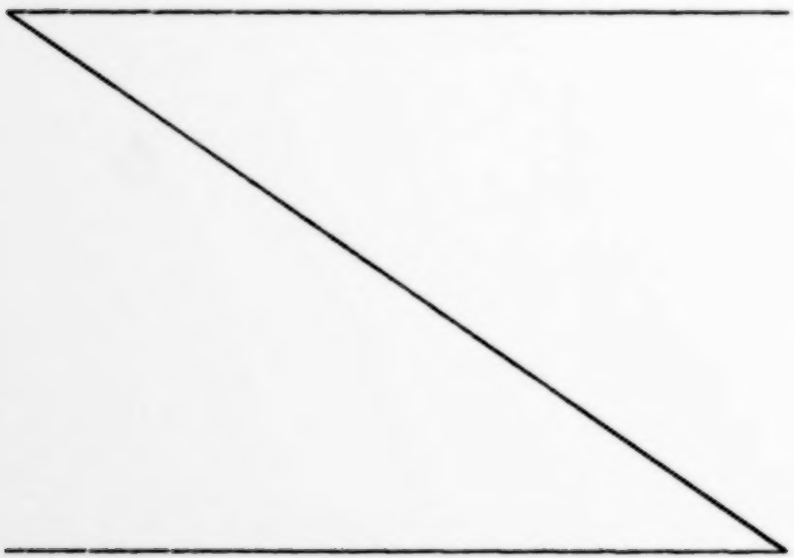
Teleprompter Manhattan with respect to cable television? A No.

Q Do you live in the building? A Yes, I do.

Q How long have you lived there? A Since I purchased it.

Q Did you move in simultaneously with your purchase? A The day of the closing, that's right.

Q Have you ever executed a contract with Teleprompter or Teleprompter Manhattan CATV? A No, I have not.



Q I believe you have already testified that you are aware of the following components on your building; one, a silver box; two, a roof cable; three, a drop cable; and four, various staples that are used to attach the cable to your building. A Yes.

Q Aside from those, are you aware of any other components or properties of Teleprompter Corporation or Teleprompter Manhattan CATV Corporation that are on your building? A No.

Q Where is the silver box located? A In the center of the roof. Excuse me, in the center of the cable that runs across the roof.

Q Are you on the northern or southern side of 105th Street? A I face south, the north side.

Q Are there buildings to the east and west of 303 West 105th Street? A Yes.

Q Do you know whether the cable that runs across 303 West 105th Street goes to the building immediately to the west of 303 West 105th Street? A Yes.

Q How long have you been aware of that?

THE WITNESS: Where it goes?

MR. LESCH: Yes.

A Since the first time I noticed it.

Q Since 1972? A Yes.

Q How long have you been aware of the silver box? A Since that time.

Q Of the drop cable? A Since Tony Brescia had it put in. What would that be, three years ago, two years ago. No, the guy before, Roy Black.

Q That would be before around 1974, I believe you said? A. Yes, three years ago.

Q How long have you been aware of the cable going to the other apartment

which you mentioned, which is either Mr. Deane's apartment or Mr. Berkowitz's apartment? A The past six months.

Q When you became aware of that, did you call up Teleprompter and complain? A No, because this was already instituted.

Q I take it that you have been aware of the staples in the building since 1972, is that right? A. Yes.

MR. GRUEN: That is not an accurate description of the testimony. The staples--she referred pertaining to the drop cable down in front, which was 1974.

Q Were you also aware of the staples in connection with the roof cable? A The roof cable is mostly attached by drilling into the stone.

Q So you were aware of the staples since 1973, is that correct? A Yes.

Q Will you describe the injury to your premises that has resulted from

these components? A Well, the breaking into the stone. You know, the holes for the drilling through limestone portions, stapling through brick portions and limestone portions.

Q Does that complete your description? A Yes. I think photographs would help.

Q Have you taken photographs? A Not yet.

Q Have you had any of these repaired? A No.

Q Have you obtained an estimate as to the cost of repair? A No. It's a landmark building and--not everybody can repair it.

Q Aside from the question of the injury to the building, how would the space on the roof and on the side of the building be used if there were no cables, silver box and staples on the building?

A It would still remain a facade of a house.

Q What I am trying to get at is, you wouldn't be using this space in any other way. The house would just be standing there, isn't that right? A That's correct.

Q The place where the silver box is on the roof of the building would be empty, is that right? A True.

Q The place on the roof of the building where the cable runs would also be empty, is that correct? A True.

Q The place on the front or back of the building, wherever the cable happens to be, the drop cable, that would also be empty, is that right? A That's right.

Q Do you personally negotiate the leases with the tenants in 303 West 105th Street? A Yes. Could you tell me what you mean by negotiate?

Q If a tenant wants to move into the building, do they talk to you about it? A Yes, that is true. I am the person.

Q In the course of your dealings with prospective tenants, have they ever said to you that they would like to subscribe to cable television? A No.

Q Has any prospective tenant ever said to you that they wished to subscribe to cable television? A No.

Q Have you, in the course of your dealings in the real estate business, been responsible for the renting of other apartments? A No, I have never--

Q Have you, in the course of your dealings in the real estate business, been responsible for the selling of co-operative apartments? A Yes, I have been.

Q In that regard have prospective purchasers of co-ops told you that they

would like to have cable television? A No.

Q Has any person in the course of your ownership of 303 West 105th Street and in the course of your business as a real estate broker, mortgage broker and the like, ever discussed CATV with you? A No.

Q Leaving aside the question of whether your building has been physically damaged in any way, is it your belief that the value of your building has been diminished by the presence of these CATV components on the building? A Yes.

Q By how much has it been diminished, in your view? A That is very hard to judge. It is just ugly.

Q I am not talking about aesthetic value. I am talking about monetary value. A I know. That is the value.

MR. GRUEN: You have asked her a question pertaining to value, which is

determined by any number of components, among which are certainly aesthetics. And if she chooses to answer, taking that into account, I think it is within her prerogative to do that.

MR. LESCH: I am asking her now a different question that relates to monetary value. What you could sell the building for.

Q Is it your belief Mrs. Loretto, that the presence of those components, CATV components on your building means that if you wanted to sell your building tomorrow, you would get less for it than you would if there were no CATV components on the building? A Shall we say I think I could get more if they weren't there?

Q You think so? A Yes, the whole block would.

Q I am not talking about the whole block. I am just talking about your

building. Are you aware of the fact that certain owners of buildings have stated that they believe the values of their buildings are increased by the presence of CATV availability in the building?

MR. GRUEN: I object to the question. I think it is argumentative. She answered the question as to her belief concerning the value of her building as affected by CATV components. I don't see how her knowledge as to the opinion of others is at all relevant.

MR. LESCH: Are you directing her not to answer?

MR. GRUEN: Answer the question as best you can.

A In my experience large apartment house owners find it an advantage, for those tenants on a court, et cetera, who really couldn't get reception without it.

Q Is your experience that only large apartment house owners find it to

be an advantage in terms of increasing the value of their buildings?

MR. GRUEN: She hasn't said that she thinks it increases the value of their buildings. She said that the owners consider it an adantage to have CATV.

MR. LESCH: That was my question. Did you understand my question, Mrs. Loretto?

THE WITNESS: Sort of, yes.

Q When I was talking about the presence of cable components and the fact that that meant that tenants of the building could receive CATV signals whereas otherwise they couldn't, my question was whether you were aware that owners of some apartment buildings thought that that increased the value of their buildings? A Yes, I agree with that.

Q I believe you said that owners of large apartment buildings where tenants faced the courts and couldn't get

reception-- A True, where they had no reception. Large co-ops--

Q --would consider it an advantage to have cable television. Would they also agree that that increased the value of their building, as far as you know? A Yes.

Q Other than the owners of large apartment buildings, are you aware of any other owners who believe that the ability of their tenants to receive CATV signals increases the value of their buildings? A Not in smaller buildings.

MR. GRUEN: I want to register the same objection to the question, and Mrs. Loretto has answered, I assume, to the best of her ability.

Q Has any offerer, to your knowledge, in the sense that we used that expression before, someone who wanted to purchase your building, told you that they would offer more for the building

if it didn't have CATV components on it?
A No.

Q Has anyone ever told you that the value of your property was diminished because of the presence of these components? A A waterproofing specialist who repaired the back of the building told me that I would have water leakage in the front of the building from these huge staples. They are like horseshoes. From the drilling, that there could be water damage.

Q Aside from the question of damage, which is not really involved in this lawsuit, I am talking about in terms of your ability to sell the building, assuming that any injury to the face of the building has been repaired, whatever that cost may be, has anyone ever said to you that the value of the building or the price which you could receive upon the sale of the building was lessened because

of the presence of these CATV components on the building? A No one has said that.

Q Have you ever requested that Teleprompter remove the cables from the building? A The first time I called, yes.

Q That telephone call? A Yes.

Q Back in 1974? A Yes.

Q I believe you said before you didn't remember the name of the person that you spoke to. Would you do your best to recreate that telephone conversation for us? Just tell me what you said, what the person at the other end said, what you said and so forth, as best you can. A Well, I called and asked for the person who was in charge of installation in upper Manhattan. And after one or two switches I got that person. And he said that the tenant had ordered it. That because it was ordered and it

was contracted by someone, therefore it was in effect, it was all right.

MR. GRUEN: We are talking about 1974 now, not 1972, is that correct?

THE WITNESS: That's correct.

Q Are you done with your description of that conversation? A I didn't know what my rights were, if the tenant had indeed made that type of agreement and paid for it.

Q Did you tell that to the person at Teleprompter? A I said, "He's the tenant, but I'm the owner, and no one asked me." And then it was just like a confrontation where I said--

Q Just try to tell me what that person said and what you said as best you recall. A He said he was sorry, there really wasn't anything he could do, that he had a subscription and that it was paid for.

Q What did you say? A And I

just said, "Thank you very much." Then I began to sit down and think about what my rights were. Tenants never ask landlords' permission, they just do things.

Q Let me see if I understand you. As you have described that conversation just now, you said that you called up the man at Teleprompter and you told him about what you had seen, and he told you that the tenant had ordered it and then you said that you objected to that? A Yes.

Q My question is, again, having gone back and thought about that conversation a little bit, do you remember specifically asking Teleprompter to remove the cable components that were installed on your building? A No, I did not ask that. I didn't want to offend the tenant. I wanted to find out what was right.

Q My question is, have you ever specifically asked Teleprompter to remove the components on your building? A I asked them what they were going to do about it.

Q But my question is a very specific one, and as I said to you before, off the record, I think it will facilitate matters if you will just answer my question. I want to assure you that I am not trying to cut you off, and if you ever feel like volunteering, you can. But I think it will shorten matters if you will just answer my question, which is, have you ever specifically asked Teleprompter to remove the components from your building? A No, I have not. But again, because I didn't want to upset the tenants.

MR. GRUEN: There is no need to add to that. I do want to refer to the letter written on behalf of the block

association, because in light of the questions that you have asked now, it may be that this does become relevant. I don't remember the contents of it, but Mrs. Loretto's answers will be modified by whatever that letter says.

Q I believe you said that Mr. Tony Brescia is presently receiving CATV services? A I think he is. The cable was hanging loose when Black moved.

Q Did Mr. Brescia have a conversation with you about CATV when he moved into the apartment? A No.

Q Now, you also said that either Mr. Deane or Mr. Steven Berkowitz has CATV in their apartment? A I believe one of them has.

Q. Did you have a conversation with that person about CATV? A No.

Q Have you ever spoken to them about the fact that they are obtaining CATV services from Teleprompter? A No.

Q Did that person secure permission to receive such services before they were installed? A No.

Q Do you happen to know whether you use the real estate board form of apartment lease? A I use an approved ABA.

Q We will get those leases. A Julius Blumberg form.

Q Is it your present wish that Teleprompter Manhattan CATV Corporation remove the cables from your building? Assuming that they were willing to repair any damage that was done to your building, is it your present wish that they remove those cables?

MR. GRUEN: I think that is answered by the lawsuit.

MR. LESCH: I don't think it is.

A That is a hard one to answer. I have good tenants. I don't want to upset them.

Q Is the block association a landlord group? A No, it is a complete tenant group. I am one of the few landlords that is involved.

Q Have you ever had any meetings with respect to cable television? A Not specifically for that purpose.

Q Have you ever spoken to Teleprompter personnel as distinguished from Teleprompter Manhattan personnel?

THE WITNESS: Do you mean people at the office or people in the street on the trucks?

Q I believe you have said before the only time you ever had a conversation with anyone from Teleprompter was this one conversation in 1974 that was occasioned by the fact that you saw the wires coming into Mr. Black's apartment. A Yes.

Q Do you recall whether you spoke --and I believe you said you spoke to

someone at the uptown office which indicates to me that it was Teleprompter Manhattan CATV Corp. you were talking about? A That's right.

Q Have you ever spoken to anyone at Teleprompter Corp., as distinguished from Teleprompter Manhattan? A No, I have not.

Q How did you become aware that you had a claim, if indeed you do have a claim, against Teleprompter and Teleprompter Manhattan CATV Corporation? A By discussing it with a lawyer.

Q Are you aware that your maximum recovery in this case would be approximately $200?

MR. GRUEN: I will object to that. It assumes facts which nowhere appear on the record, to my knowledge, at least.

Q Are you aware that your stake in the outcome of this action is very small

and may be below $200? And I am quoting from a brief submitted by your attorney, page 7 of a document called, "Memorandum on Class Action Order."

MR. GRUEN: May I see that, please? A Yes.

MR. GRUEN: Could you repeat that?

(Read question.)

MR. GRUEN: My objection pertains to the form of the question, and I instruct the witness not to answer.

MR. LESCH: Will you state your objection to the form, so if possible, I can correct my question?

MR. GRUEN: The statement in the memorandum is, "It has previously been pointed out that the stake of plaintiff in the outcome of this action is very small and may be below $200." I think another statement may appear elsewhere, but this one isn't purported to be a

statement of fact, but a statement that--something was previously pointed out.

MR. LESCH: Are you disaffirming this statement that you made to the court?

MR. GRUEN: I am doing neither.

MR. LESCH: Are you saying now that in your view the stake of plaintiff in this action is not very small and may exceed $200?

MR. LESCH: [Sic, GRUEN] I don't know that Mrs. Loretto knows precisely what her damages are in this in monetary terms, but I don't think that that testimony can properly be brought out by alluding to a statement of fact made by you.

MR. LESCH: Mr. Gruen, I would be very surprised if you, having made that statement in a brief to the court, were now to say that you were not trying to convey the impression to Judge

Gelinoff at that time that Mrs. Loretto's stake in this action was very small and was less than $200. But if that is what you are saying, I would like to know about that.

MR. GRUEN: I made a statement as a lawyer, and it reads exactly as it reads in ths memorandum, I have quoted it in full, you quoted it in part. I don't think there is anything to be added except by Mrs. Loretto's direct testimony as to the facts, not as to what someone else said.

Q Mrs. Loretto, do you have any idea as to what your maximum recovery in this action could be? A No.

Q Are you aware that your attorney has indicated to the court that your maximum recovery in this action will be less thant $200?

MR. GRUEN: That is not the statement there, and I object to that

characterization of it.

Mr. LESCH: Will you let the witness answer the question?

MR. GRUEN: No. I object to the form of the question.

Q Do you believe that your maximum recovery will exceed $500 in this case? A I have no idea.

Q Are you aware of the fact that if you lose this case you will be liable for costs? A Yes, that is true.

Q Do you know what the amount of the costs that you will be liable for is? A No.

Q Are you aware that those could exceed $5,000? A No.

Q Has anyone told you that you will not be liable for all of the costs in this action?

MR. GRUEN: I object to the question and instruct the witness not to answer.

MR. LESCH: On what basis do you object to the question?

MR. GRUEN: First of all, that Mrs. Loretto's liability or lack of liability for costs is not relevant. Secondly, that to the extent it might have at one time been relevant, it would have been in connection with the class action motion. If that motion has been made and decided a long time ago, in fact, before Mrs. Loretto was ever notified for deposition.

MR. LESCH: Mr. Gruen, Mrs. Loretto has testified that she was not aware that she is liable for costs and that she is not aware that costs could exceed $5,000, and that she doesn't know what her maximum recovery is in this action. And I submit to you that it is highly relevant on whether she is going to continue to act as class

representative in this action, whether she knows these facts.

MR. GRUEN: I disagree, and--

MR. LESCH: I think I am entitled to an answer, and I advise you that I am going to seek a ruling if you do not permit Mrs. Loretto to answer these questions.

MR. GRUEN: I repeat the instruction to her not to answer. I am afraid I have been extremely generous, maybe overly generous in allowing her to answer questions on this subject up until now, but I will not allow this to proceed.

Q Are you aware that costs in this action could exceed $5,000?

MR. GRUEN: That question has been asked and answered.

MR. LESCH: Perhaps it has. I don't recall the answer. What was it?

MR. GRUEN: If it hasn't been answered, then I object to it and

instruct the witness not to provide any further answer.

Q Are you aware that your attorney has stated to the court in a document entitled, "Plaintiff's Reply Memorandum on Class Action Order," at page 11, as follows: "If notice were to be mailed to every member of the class as proposed by defendant, and the class consists of 10,000 persons (probably a low estimate based on information acquired by plaintiff since the institution of this action), and if as defendant suggests, one were to mail notice not only to each member of the class individually, but to each address on which components have been placed (thus presumably doubling the number of notices to be mailed) defendants could be assuming a mailing cost of 10 cents per notice. This is less than the cost of first class postage. The schedule annexed to plaintiff's

memorandum dated January 13, 1977, shows a minimum cost of 23 cents per notice. Defendant's estimate would also ignore the cost of renting a post office box. Thus a more realistic figure based on defendant's proposals would be upwards of $5,000." Are you aware that your attorney told that to the court? A No.

MR. GRUEN: I want to comment that the question itself is totally irrelevant, since the order does not require notice to be given in the manner which is state there.

MR. LESCH: That remains to be seen. I disagree with you.

MR. GRUEN: The statement there is notice by mail to owners and to locations. The requirement of the court in its order is that mailings be made to owners at their address, not to locations where installations have been made.

MR. LESCH: My recollection is different, but we can take a look at the order and decide that.

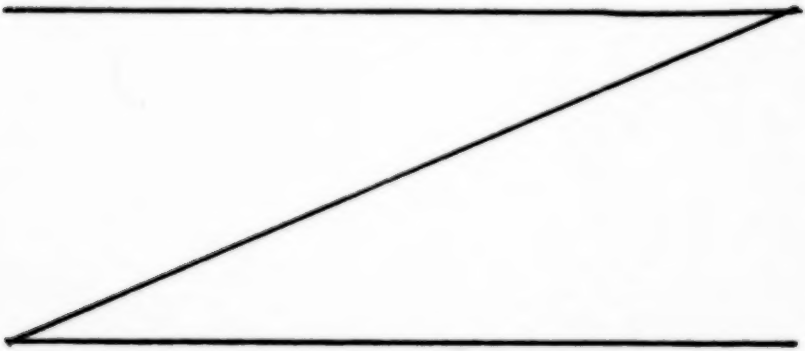
Q Has anyone advised you that you will not liable for costs in this action, whether or not plaintiffs prevail?

MR. GRUEN: Object and instruct the witness not to answer.

Q Has anyone advised you that someone else will pay for costs if you lose this case?

MR. GRUEN: Object and instruct the witness not to answer.

Q Do you have any idea of what the total costs of mailing notice to the class are in this case?



MR. GRUEN: Object, but the witness may answer if she is able. In other words, if you have personal knowledge of what the costs of mailing to the class are, you may answer that you do have such personal knowledge. If not, the answer is no.

THE WITNESS: Are you indicating that I personally would be responsible?

MR. LESCH: Yes. I am asking you whether you know that.

MR. GRUEN: I again instruct the witness not to answer that question.

THE WITNESS: I wouldn't answer it yes or no, that is the problem.

MR. GRUEN: Now you are referring to the question of how much the cost of mailing would be.

(Discussion off the record between Mr. Gruen and his client.)

MR. GRUEN: The question that Mr. Lesch asked, if I can paraphrase it,

is whether you are aware of what the cost of mailing to the class would be. A No, I am not.

Q Do you know that it would exceed $1,000?

MR. GRUEN: Object to the question and instruct the witness not to answer.

Q Do you know that it will exceed $2,000?

MR. GRUEN: Same objection.

Q Do you know that it will exceed $5,000?

MR. GRUEN: Same objection.

Q Do you know that your potential recovery in this case, if plaintiff wins this case completely, will be substantially less that the cost of notifying members of the class of the pendency of this action?

MR. GRUEN: Same objection.

MR. LESCH: And you instruct the witness not to answer?

MR. GRUEN: Yes. I also point out that that is a highly misleading question, because obviously if plaintiff is totally successful in this action, such costs will be paid out of the recovery, not to her individually but to the class members. Therefore, the relevance of that question is rather hard to find.

MR. LESCH: I am talking about a potential recover on the one hand and potential liability for costs on the other.

MR. GRUEN: I understand, but the question to her is whether her personal recovery would be vastly exceeded by the amount of the costs of pursuing the action, and I consider that question totally irrelevant.

MR. LESCH: If there is any question of ambiguity, I will rephrase the question.

Q Do you understanding that your exposure in terms of liability for costs in this case far exceeds your possible recovery in the event that plaintiff should prevail?

MR. GRUEN: I object to the question and instruct the witness not to answer.

MR. LESCH: On what grounds do you object, as to form or substance?

MR. GRUEN: Relevance.

Q I would like to inquire, Mrs. Loretto, why it is that you are brining this action in light of the fact that your potential recovery is relatively small. I believe Mr. Gruen has used the figure of less than $200, whereas your exposure for costs in this action is very

large, and again Mr. Gruen has used the figure of $5,000.

MR. GRUEN: I object to the question and instruct the witness not to answer in both form and substance.

MR. LESCH: State your objection to form so that I can correct that, so we just have the substance objection.

MR. GRUEN: The form included assumptions that the exposure is greater than the possible recovery, and as far as I know, that isn't the evidence.

Q Mrs. Loretto, has anyone told you that the amount of your possible recovery in this case is as great or greater than the amount of your possible liability for costs in this case?

MR. GRUEN: Object to the question and instruct the witness not to answer.

MR. LESCH: Is that as to form or substance?

MR. GRUEN: As to substance.

MR. LESCH: At this time I would like to suspend the deposition and wait to hear from you, Mr. Gruen, with respect to the documents that I have requested. Some of them you have indicated that you will produce, and others you have indicated that you want to consider further. After I have received those documents and after I have obtained rulings, then we can arrange a further date for the deposition if one is required.

MR. GRUEN: You have completed all questions now other than questions relating to the documents which you have asked to have produced, and questions on which you are going to seek rulings?

MR. LESCH: I have done as much as I can without the documents and without the rulings.

Off the record.

(Discussion off the record.)

EXAMINATION BY MR. GRUEN:

Q You testified that you are aware that an installation was made on the roof of the premises 303 West 105th Street sometime in 1972. Do you recall how you became aware of that? A Just by visiting the roof for usual watching of storm damage, clogged gutters. I visit the roof, I would say, every two or three weeks, just to look around.

Q Was it in 1972 or was it at a later time that you actually became aware of the installation there? A It seems to me it was later.

Q You are uncertain. A I am uncertain. All I know is that when I bough the house, I could be certain that I didn't see it. But I saw it later.

Q When you bought the house, you went up on the roof to inspect it? A Yes.

Q This was before you actually bought the house? A True. I also had new roof placed on it the first year I owned it, and I could be certain that it wasn't there then, because I was up there every day while the roof was there.

Q When you inspected the roof before you bought the house, what were you inspecting for? A For leaks, for bubbles in the tar, for leakage around the retaining walls, chimneys, the bulkhead.

Q Where exactly on the roof is the roof cable located? A It runs across the front of the building.

* * *

[DEPOSITION OF RONALD R. SIMON
February 24, 1977]

[Title and introductory material omitted in printing]

* * *

[19-20] Q [By Mr. Gruen for Plaintiff] Under what circumstances would the other item, power duplexer and direction --pardon me, and the power supply be located in building rather than in the street?

MR. LESCH: Take them one at a time.

Q Let's talk first about the power supply. A The power supply would be located in the basement of a building or at some other convenient location to obtain power which is protected from the outside elements.

MR. LESCH: Under what circumstances? A Under almost all circumstances.

Q What would another convenient location be. What do you mean by other

convenient locations? A On the exterior of a building or some other substantial structure that protected it from the elements. It wouldn't be able to be in an underground area which was exposed to flooding or high water, pollution of some sort.

Q So then if I understand you correctly the power supply is normally not located in the street but is normally located in buildings or attached to buildings? A That's right.

Q Then let's go to the power duplexer. A The power duplexer would be located in a building if it were powering a given amplifier in that building.

Q Would that normally be in larger buildings with a large number of subscribers? A In most cases it would be.

Q What would other cases consist of? A If an amplifier were feeding several buildings of a smaller type.

* * *

[23-27] Q [By Mr. Gruen] Without going into detail on all of these items on the board of which there are some 20 or 25 items can one generalize and say that they can all be used for entering a cable and for distribution to a subscriber without necessarily being used for existing cable? A That's correct.

Q Some are installed inside and some are installed outside a building but they all have basically the same function? A That's correct.

Q And that function is to take an incoming cable, split it into two or more parts either for subscriber usage or for a combination of subscriber usage and extending the cable to a further building or group of subscribers, is that correct? A That's correct.

Q One further thing on the board that we have just been taking about. In each case the item of equipment is screwed to the board. Is the method of attachment typical of the method of attachment that is used in actual practice? A Yes, the only exception being that the exterior items would generally use a larger screw to secure them to the structure.

Q Could you describe the screws that are used here? A The screws here are a self-tapping sheet metal type of screw.

Q What length? A Approximately two inches.

Q The screws which are used for exterior attachment, could you describe those? A Two inches with a diameter of 3/16ths of an inch instead of 1/8th of an inch.

Q So the interior screws are

diameter 1/8 and the basic difference between the screws is the diameter rather than the length? A That's correct.

Q Then going back to the other board. Could you describe the method of attachment of the items of equipment on that board. A They are again bolted to the structure in all cases.

Q Is there a standard method of doing that? A Yes. A method is to drill a hole into the masonry structure, place a lag shield into the structure, then secure the individual piece of equipment to the structure with a bolt entering the lag shield that was placed into the structure.

Q Are standard lengths of bolt used in those cases? A Yes.

Q What is the standard length? A Two to two and a half inches.

Q That board also contains lengths of cable? A That's correct.

Q Between the various components and the lengths of cable are from time to time attached by a ring which is screwed to the board. Is that method typical of the way in which the cable is attached to a building? A Yes.

Q So that would it be correct to say that when cable is laid on a building or across a property it would be attached to the building or property from the time along its length? A Yes.

Q Is there any standard frequency of attachment? A Generally every two feet.

Q Every two feet? A Yes.

Q The method of attachment then is the rings which appear on that board? A Yes.

Q And screws which attach the ring to a building? A Or nails in some instances.

Q Is there a standard length and diameter of screw used for those? A It would be 1/8th of an inch, approximately one inch to two inches in length. Depending upon the structure.

Q And the nails are of what type? A They would be of a masonry type, between an inch and two inches in length.

Q Is it possible to lay cable across a building without having equipment on the building itself for the purpose of submitting a signal? A Yes.

Q Or equipment for amplifying or providing power? A That's correct.

Q So that the sole facility on a particular building could be a cable with the necessary attachment equipment? A That is true or correct.

Q I am referring to your affidavit dated February 18, 1977 which was submitted recently to the court in this case. You state that on more than 99

percent of the buildings on which Teleprompter Manhattan has installed CATV components, one of two basic types of components are used, then you describe two types. Are you referring to the equipment that we have been discussing such as an amplifier's directional taps or are you including cable? A We would be including cable in addition to amplifiers and taps.

Q Does that mean that on 99 percent of the buildings on which you have installed cable you would have installed directional couplers or taps in addition? A Yes, one or more of these items.

Q By what method did you reach the 99 percent figure? A Just an average of what we know to be in existence.

Q Did you study records of the company in order to reach that figure or is this one which you sensed by your

general experience without having made a specific study? A Sensed by the experience with this system.

* * *

[38] Q [By Mr. Gruen] Do you know whether prior to January 1, 1973 there were any instructions as to what rate of compensation the company was willing to pay to owners for entering into such contracts? A I couldn't answer it accurately. I know there was a rate of compensation. What that rate is I am not familiar with.

Q In other words, you are aware that there was an instruction to persons who entered contracts that they should agree to a particular rate of compensation but you don't know what that rate was? A Correct.

* * *

[47] Q [By Mr. Gruen] When you mentioned before that cable is attached at I believe at two or three foot intervals, were you referring to exterior cable only or to distribution subscriber lines as well? A It wouldn't be subscriber lines; it would only be for distribution.

Q Exterior? A Right.

Q How are interior lines attached? A Interior would be within a metal holding or flashing protecting it or in some instances it would be in conduit. Where the cable would be exposed it would be fastened in the standard two to three foot manner.

Q In some cases it is exposed? A Yes.

Q The conduit or molding, is it fastened to the walls of the interior? A That's correct.

Q In a standard manner? A Which would be approximately every one to four feet. Depending upon what surface it was attached to.

* * *

[78-80] Q [By Mr. Gruen] You have mentioned that there are cases where the power supply is placed in the building or is attached to a building and that as I understand it, the purpose of the power supply is to convert or reduce the voltage from 110 to a lower figure. Does that require the input of electricity into the power supply? A Yes.

Q Where is that taken from? A The building power.

Q How is that paid for? A It would be by meter.

Q By meter in the name of Teleprompter? A That could be one means.

Q What would other means be? A We could reimburse the landlord.

* * *

Q Where you utilize the electric current which is billed to the landlord of the premises, is there any kind of agreement as to how the landlord is reimbursed?

[Colloquy omitted in printing]

A In some cases it would be written, in some cases it would be a verbal agreement.

Q Do you know whether in all cases where the current that is used is metered to the owners of the premises and Teleprompter Manhattan reimburses the owner? A I couldn't say in all cases.

* * *

[DEPOSITION OF NICK LEUCI
September 19, 1977]

[Title and introductory material omitted in printing]

* * *

[47] Q [By Mr. Gruen for Plaintiff] Let me show you a copy of a document marked as Defendants' Exhibit 9 [JtA167] at the deposition of Ronald Simon February. Can you describe what that is? A What the whole picture is?

Q Yes. A This is a block diagram showing the street perimeters surrounding the block between First and Second Avenues. It also shows the trunk system in the street, the particular nomenclature; SP-2 being an amplifier, the other octagons, triangles and squares being other electronic components that are accessories and a vital part of the trunk system, the dotted line showing that there is an underground connection from the

main-line amplifier to a particular house, and it shows distribution of cables on the entire block.

* * *

[61-62] Q Do you know whether there was a common amount of compensation to landlords or a common method of computing the amount of compensation to landlords? A Prior to the Kelly Bill?

Q Yes. A Yes.

Q What was that method or amount? A Five percent of Teleprompter's gross income received from the building.

Q From the building on which the installation was made? A From the subscribers.

Q Let's clarify that. Is it correct that the common practice with respect to compensation prior to the effective date of the Kelly Law was that Teleprompter Manhattan would pay the

landlord five percent of the gross revenues derived from subscribers located in the building on which the equipment had been placed? A Yes.

Q Were there deviations from that practice, to your knowledge? A Yes.

Q Would you say, nevertheless, that over 80 or 90 percent of the--in over 80 or 90 percent of the cases where compensation was made, it was at the rate of five percent as you have described it, or can you approximate? A I don't know the percentages.

Q Can you say that it was over, let's say, 60 percent? A Most of those I saw were at that percentage rate, if you can determine that it was more than 60 percent. I don't know.

* * *

[63] Q Do you know whether there are instances where Teleprompter Manhat-

tan utilizes electric current provided by Con Edison to the landlords of the building in order to furnish power to the Teleprompter Manhattan power supply unit? A Yes.

* * *

[63-64] Q The question was: any kind of special arrangements with the landlord with respect to using his power to power your units? A Yes.

Q What were those arrangements? A Compensation for the electricity used.

* * *

[64] Q In all cases--I don't mean by that to exclude the possibility that there may have been inadvertent exceptions--but was it the standard practice while you were Director or Manager of Real Estate for Teleprompter Manhattan to enter into written agreements with owners for the use of their power? A No.

Q Was oral authorization of some sort obtained as a matter of standard practice? A No.

* * *

[65] Q * * * In what form was the agreement that the landlord obtained for determining the amount of reimbursement? A The landlord would telephone--it would be discussed.

Q The landlord would telephone? A Telephone, and it would be discussed, the amount of power that is used. At times he would have an electrician check and a rate was established.

* * *

[66] Q You have testified that if the landlord telephoned Teleprompter Manhattan, then a determination would be made by discussion between the landlord and Teleprompter Manhattan as to the amount of reimbursement to be made by Teleprompter Manhattan; is that correct?

Q What happened if the landlord didn't telephone? A And didn't request compensation? Then he would not have been compensated.

Q There are situations if I understand you correctly, where Teleprompter Manhattan would utilize the electric current supplied to a building in order to power its own power supplies, but would not compensate the--would not reimburse the owner for that usage? A Yes.

* * *

[72-74] Q Do you know whether it makes any difference in installing a CATV cable whether it runs close to an electric power wire or not? A Yes.

Q What difference does it make? A If the power line is not properly enclosed in a metal conduit or other type enclosure and the cable--if cable television is quite close or possibly attached

to that, it can cause interference in the cable line.

Q What other type of enclosure would be adequate to guard against such interference? A If the power line itself was enclosed in a BX type enclosure--

Q That's a metal enclosure? A That's a metal type as well.

Q Can a BX enclosure not be metal? A No. It would have to be enclosed in a metal conduit or an enclosure so as to not have any interference with the cable lines.

Q How close does the cable, the television cable, have to be to the power line to cause interference? A I don't know that.

Q In your practice in installing cables, did you operate by any rule of thumb as to how far away-- A As far away as possible.

Q Let's try to get to the converse of that. Did you operate by any rule of thumb or practice as to how close you would not get? Like a quarter of an inch, a half inch, five inches? A You don't attach it to.

Q You might run it side by side with a power line but would not attach it to the power line? A Yes.

Q Would the same be true if the power line was enclosed in metal? A As a standard practice, yes.

Q Meaning that you still avoid having-- A Simply to get the men accustomed to not running cable near power regardless of whether or not it was enclosed.

Q If the power line was properly enclosed in metal and you attached a cable to it, that would not cause interference with the cable? A If the power line was properly enclosed and there were

no openings, no loose shields, you could run next to--very close to a power line.

Q Could you allows the cable to--could you allow the television cable to touch the metal enclosure? A You can, yes.

Q Are you at all familiar with the method by which Con Edison brings power lines into individual buildings? A No, I am not.

Q Are you aware of whether Teleprompter Manhattan has at any time given consideration to entering buildings with television cable through the same route as Con Ed uses for entering its electric power lines? A I don't know that.

Q You don't know one way or the other, is what you are saying? A Yes.

* * *

[BARRY SIMON AFFIDAVIT IN SUPPORT OF TELEPROMPTER MOTION FOR SUMMARY JUDGMENT, February 17, 1978]

[Title and notarial venue omitted in printing]

BARRY P. SIMON, being duly sworn, deposes and says:

* * *

11. Teleprompter operates nine cable systems in New York State serving over 120,000 subscribers. Teleprompter Manhattan, which is jointly owned by Teleprompter and another company, operates the cable television system in the northern half of the Borough of Manhattan serving almost 50,000 subscribers. Among the subscribers that Teleprompter Manhattan has served are tenants living in the brownstone at 303 West 105th Street.

Background

12. Cable television systems provide television signals to subscribers by

wire. In almost all cases, cable systems improve the quality of their subscribers' television reception. In many systems, including Teleprompter Manhattan's, cable television increases diversity of programming available to subscribers by "importing" television signals not available locally. For example, the Manhattan system will soon begin importing channels from Philadelphia and Boston.

13. Cable systems also originate programming. For example, in the Manhattan system subscribers are able to watch specially produced foreign language and ethnic programming designed to reach New York's diverse population; New York Knickerbocker and New York Rangers games which are not available on broadcast television; and, for additional charge, programming on the Home Box Office network consisting of recent movies (uninterrupted by commercials and unedited)

and events specially produced for Home Box Office. The Manhattan system is about to begin offering a second lower price pay television channel with programming designed to appeal to the various ethnic and racial groups locatd in the system's franchise area.

14. Nor is that all. Because cable television systems have multi-channel capacity they have, as many commentators have recognized, the potential for effecting a fundamental change in the way Americans communicate with each other. For example, the Report to the President of the Committee on Cable Communication (1974) stated:

> "Cable has the technical potential to become a communications medium abundant capacity, with an almost limitless number of channels capable of carrying virtually any kind of communications. Cable can distribute information to all households, schools, and places of business in an area, or it can route it to specific locations upon electronic request. It can offer a

two-way capability allowing users to signal their wishes back up the cable and thus select particular programming or other information, or order goods and services from among those offered.

* * *

"We believe that cable development has the potential of creating an electronic medium of communications more diverse, more pluralistic, and more open, more like the print and film media than our present broadcast system. It could provide minority groups, ethnic groups, the aged, the young, or people living in the same neighborhood an opportunity to express, and to see expressed their own views. Yet, it would also enable all of these groups to be exposed to the view of others, free of the homogeneity which characterizes contemporary television programming.

"Cable offers countless Americans a chance to speak for themselves and among themselves in their own way, and a chance to share with one another their experiences, their opinions, their frustrations, and their hopes." (pages 9-10, 15)

15. Cable systems in New York State are franchised by local municipalities and are regulated by the Commission. The franchises under which the Teleprompter

defendants operate require performance of numerous services in the public interest. For example, the franchise agreement between Teleprompter Manhattan and the City of New York a copy of which is annexed hereto as Exhibit "E", requires Teleprompter Manhattan (a) to transmit without charge City-originated programs and messages on specially designated channels (Section 3(f)), (b) to provide "access channels" without charge to the public on a first-come, first-served basis (Section 4(e)), (c) to provide free connections to hospitals, public schools, day-care centers and similar institutions (Section 4(g)), (d) to extend service throughout the franchise area at the same charge without regard to the economic feasibility of particular service (Section 3(d)) and (e) to undertake such construction and installation that may be necessary to keep pace with the latest

developments in the state of the art (Section 3(h)).

16. In 1977, Teleprompter Manhattan cablecast more than 3,500 hours of public access programming, for which Teleprompter Manhattan either incurred all expenses or charged only out of pocket costs without any profit. In 1977, Teleprompter Manhattan lost approximately $4,000,000; at December 31, 1977, its accumulated earnings deficit was approximately $29,500,000.

* * *

[Subscription and jurat omitted in printing]

[RONALD SIMON AFFIDAVIT IN SUPPORT OF TELEPROMPTER MOTION FOR SUMMARY JUDGMENT, February 17, 1978]

[Title and notarial venue omitted in printing]

RONALD SIMON, being duly sworn, deposes and says:

1. I am Director of Engineering of Defendant Teleprompter Manhattan CATV Corp. ("Teleprompter Manhattan"). I am in charge of the entire technical operation of Teleprompter Manhattan and I am fully familiar with all of the equipment used by defendants to provide cable television to their customers. Moreover, I oversee the Teleprompter Manhattan employees who actually place cable television components on buildings in New York City and I am familiar with Teleprompter Manhattan's business records which detail what cable television components have

been placed on a particular building and when they were installed. I submit this affidavit in support of defendants' motion for summary judgment dismissing the instant complaint and to supply certain facts which demonstrate that Teleprompter Manhattan's cable television components have been continuously on the roof of the premises at 303 West 105th Street since June of 1970.

2. On or before June 1, 1970, Teleprompter Manhattan installed on the premises at 303 West 105th Street all the cable components necessary to provide service to the tenants in that building. These components consisted of coaxial cable and directional taps.* This fact is

---

* A directional tap is a device attached to the parapet or cornice on the wall of the roof. It receives the cable on the input side and divides the signal to serve two distribution cables. It is used when service is to be provided to tenants in the front and back of a building.

documented, in part, by Teleprompter Manhattan's maintenance report, a copy of which is annexed hereto as Exhibit "A". This maintenance report, dated June 1, 1970, which is kept in the usual course of Teleprompter Manhattan's business, shows the signal strength of various channels carried on Teleprompter Manhattan's cable system measured from the directional taps on the front and rear parapets of the building located at 303 West 105th Street. Since this maintenance report documents various signal strengths as of June 1, 1970, it is apparent that the premises at 303 West 105th Street was fully "energized" (had coaxial cable and directional taps) by that time.

3. Further, based on the schematic drawing diagramming the cable installation at 303 West 105th Street (which Teleprompter Manhattan prepares for virtually all cable installations), a copy

of which is annexed hereto as Exhibit "B", it is apparent that by June 1, 1970, approximately 30 feet of coaxial cable was installed on the roof. The solid black line labelled "914" on Exhibit B symbolizes the installation of the coaxial cable. The symbol "3" represents the directional taps on the front and rear of the roof. Although I cannot now determine the precise length of coaxial cable installed by June 1, 1980, the length of cable would have approximated 30 feet. I say this because plaintiff's building is 17 feet long in both the front and back and the schematic diagram indicates that taps and cable were run approximately three-quarters of the way along the length of the building. The coaxial cable is placed on the front and back of the roof about 18" from the roof top and it is slightly less than 1/2" in diameter. The

directional taps are approximately 4" x 4" x 4".

4. By June 8, 1980, Teleprompter Manhattan had extended the cable from the directional taps at 303 West 105th Street to the adjoining building at 305 West 105th Street. In order to do so, Teleprompter Manhattan would have had to extend the length of cable running across the top of plaintiff's premises approximately another 4 to 6 feet. This fact is documented by Teleprompter Manhattan's building signal report, dated June 8, 1970, a copy of which is annexed hereto as Exhibit "C". The building signal report, which is similar to the maintenance report, annexed hereto as Exhibit "A", shows measurements of signal strengths for various channels for the cable components at 305 and 307 West 105th Street. Such measurements could not have been obtained unless the cables from the taps

303 West 105th Street had been extended to the adjoining premises.

5. As appears from the foregoing, by June 8, 1970, Teleprompter Manhattan's cable television components were placed on the roof of the premises at 303 West 105th Street. At no time thereafter were they removed.

[Subscription and jurat omitted in printing]

[MICHAEL S. GRUEN'S AFFIRMATION
IN SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT,
April 28, 1978]

[Title omitted in printing]

MICHAEL S. GRUEN, an attorney admitted to practice before the Courts of the State of New York, affirms under penalty of perjury:

* * *

13. My office conducted an analysis of Teleprompter Manhattan contracts which corroborates Mr. Leuci's conclusions [JtA 143-44]. Under my direction, my office reviewed contracts in the Teleprompter Manhattan files in which, according to Ronald Simon, all Manhattan authorization contracts are located. [Reference omitted in printing.] Our review covered approximately 25 percent of the file drawers containing such contracts. In those drawers, we examined the file for each

tax block ending with the digit 5 (i.e. approximately 20% of the files in those drawers). Out of the 297 contracts we examined for individual buildings, 84 percent provided for continuing compensation (either monetary or in the form of free or reduced-rate service) payable each year Teleprompter utilized the rights granted. Of these, 95 percent provided for compensation at the rate of 5% of gross revenues per year derived from the building on which the equipment had been placed. Some contracts provided for a flat fee per subscriber; these are not included in the above figures for continuing annual compensation. No claim is made to the absolute statistical accuracy of this study, but this study corroborates Mr. Leuci's testimony and shows rather clearly that Teleprompter was correct in representing to Theta Cable and Hughes Aircraft that the fee voluntarily

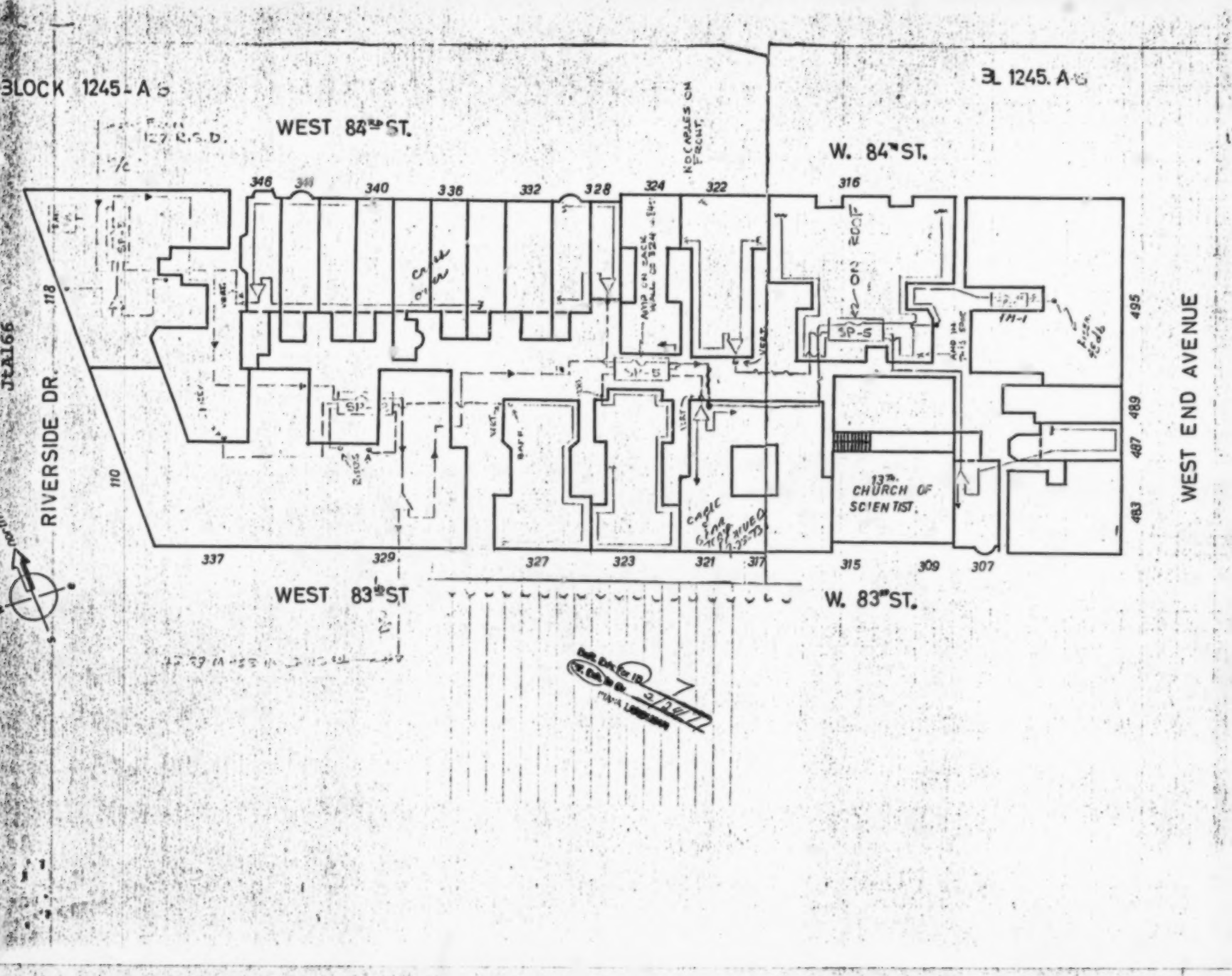
paid by Teleprompter M[illegible]attan was generally 5% of gross revenues.

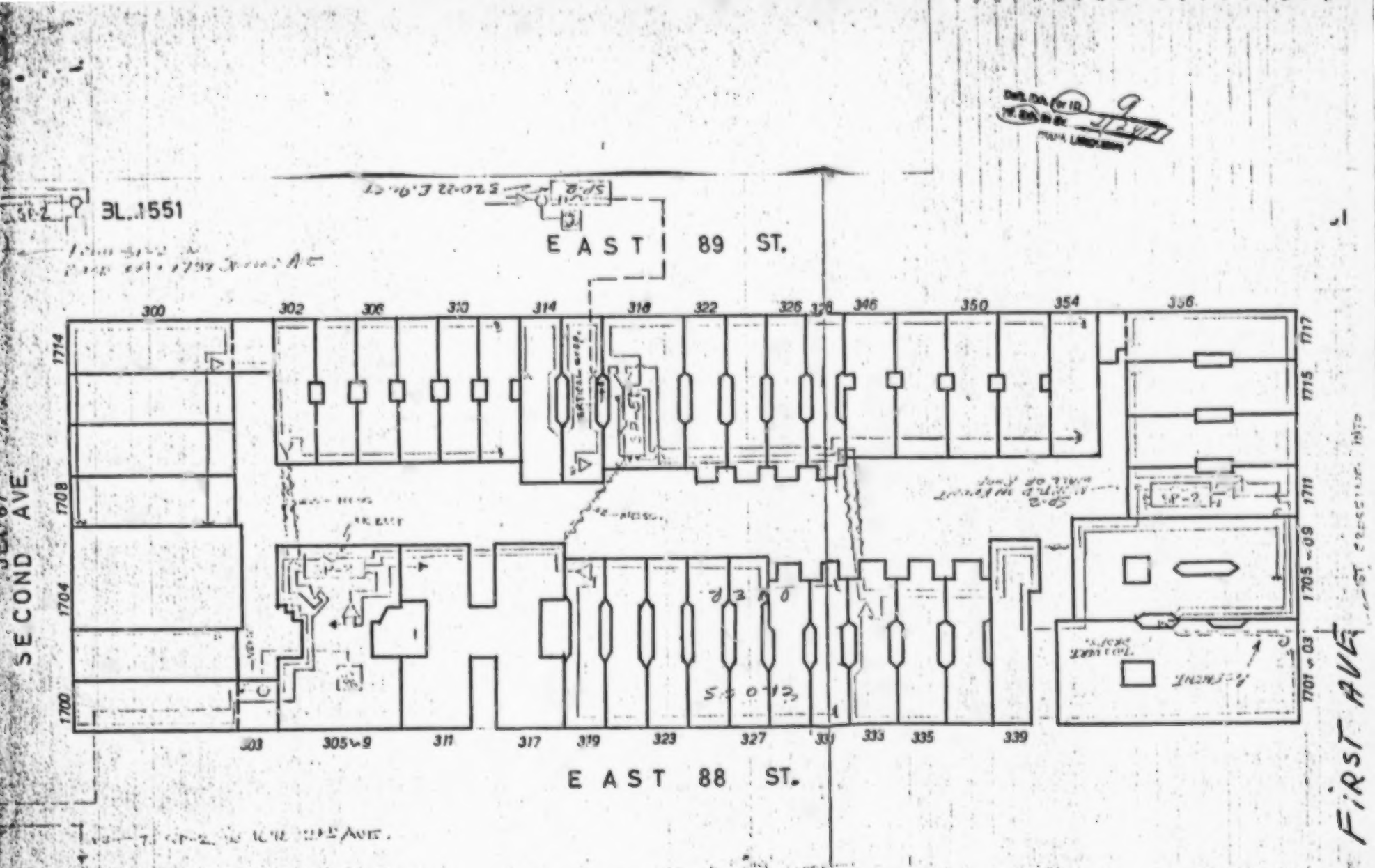
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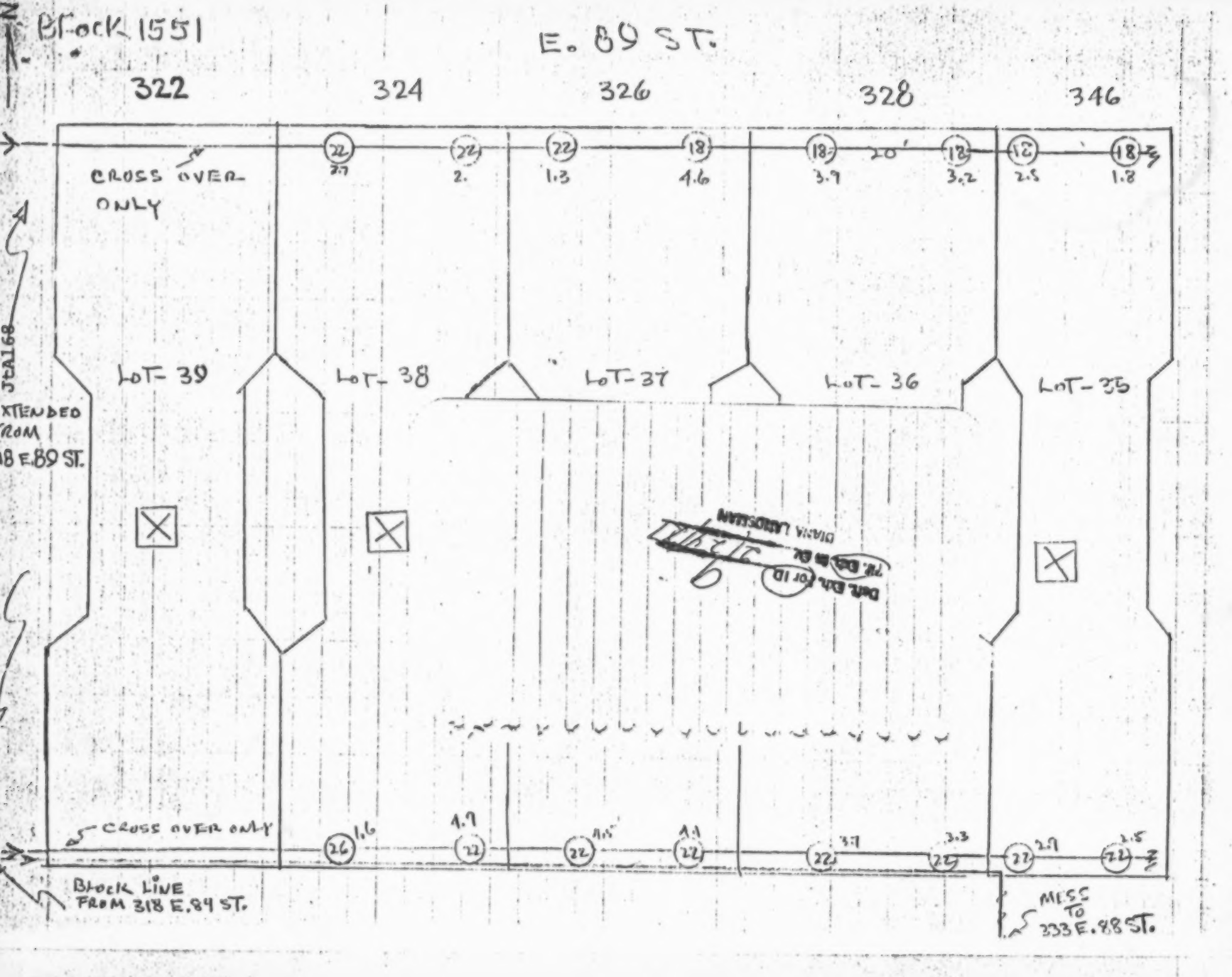
16. Teleprompter Manhattan provides similar compensation to the City for the right to install cables and equipment on City property also at a rate of 5% of Teleprompter Manhattan's gross revenues from operations in Manhattan. This appears from a series of contracts between the City and the Teleprompter Defendants. Ever since December 1965, the Teleprompter Manhattan system has been installed and maintained by permission of the City. The main agreement is dated April 18, 1970; prior thereto, interim consents were granted in anticipation of approval of a long-term "franchise".

* * *

[Subscription omitted in printing]


BLOCK 1245-A
BL 1245. A
WEST 84TH ST.
W. 84TH ST.
346
344
340
336
332
328
324
322
316
RIVERSIDE DR.
118
110
337
329
327
323
321
317
315
309
307
495
489
487
483
WEST END AVENUE
13TH CHURCH OF SCIENTIST.
WEST 83RD ST
W. 83RD ST.
SP-5
SP
IM-1

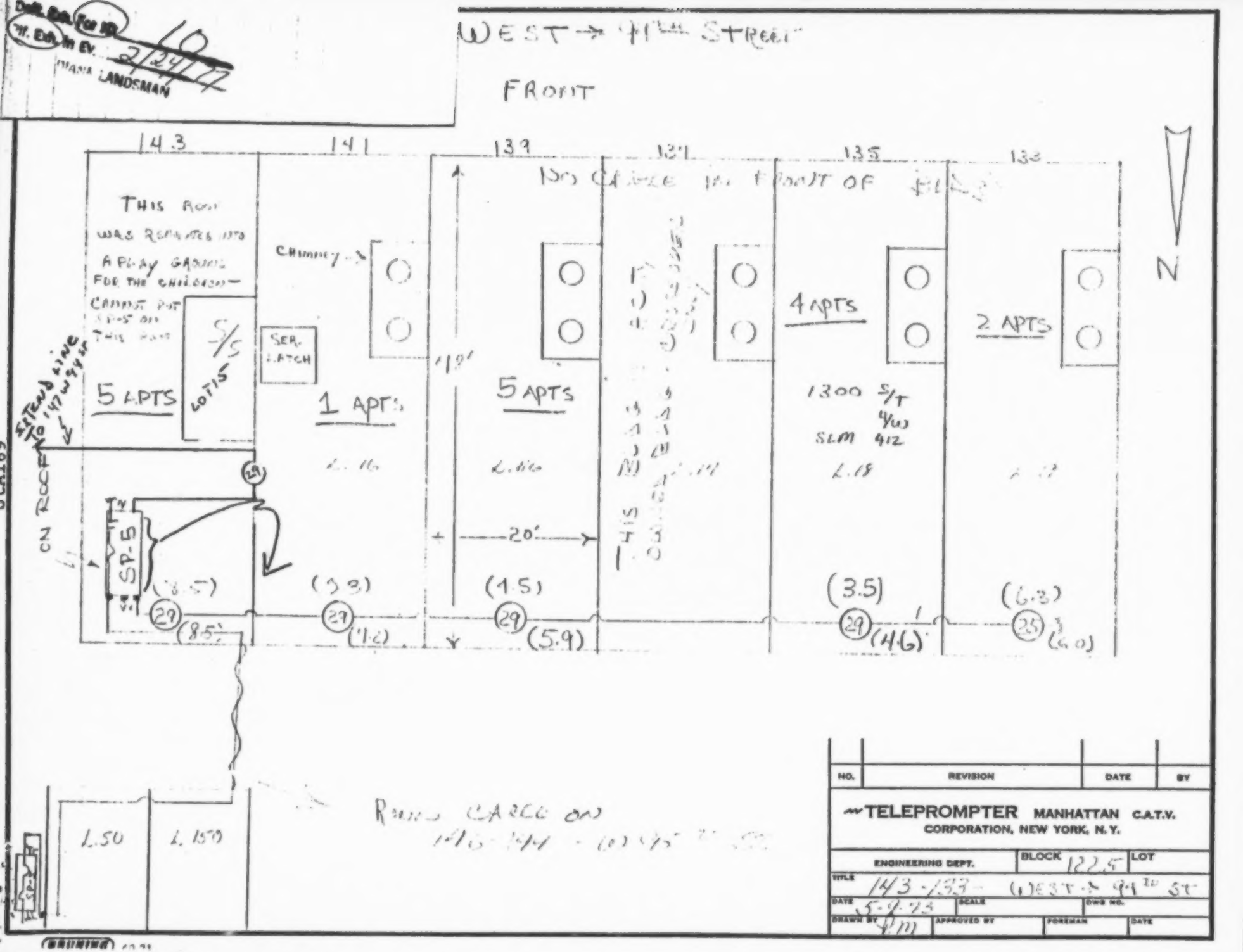

BL. 1551
EAST 89 ST.
EAST 88 ST.
SECOND AVE.
FIRST AVE.
300
302
306
310
314
318
322
326
330
346
350
354
356
1714
1708
1704
1700
1717
1715
1711
1705-09
1701-03
303
305-9
311
317
319
323
327
331
333
335
339


BLOCK 1551
E. 89 ST.
322
324
326
328
346
CROSS OVER ONLY
LOT- 39
LOT- 38
LOT- 37
LOT- 36
LOT- 35
EXTENDED FROM 318 E.89 ST.
CROSS OVER ONLY
BLOCK LINE FROM 318 E.84 ST.
MISS TO 333 E.88 ST.

Draft. Est. For ID
Mt. Est. In Ev.
MANH. LANDSMAN
2/24/77

WEST → 9TH STREET

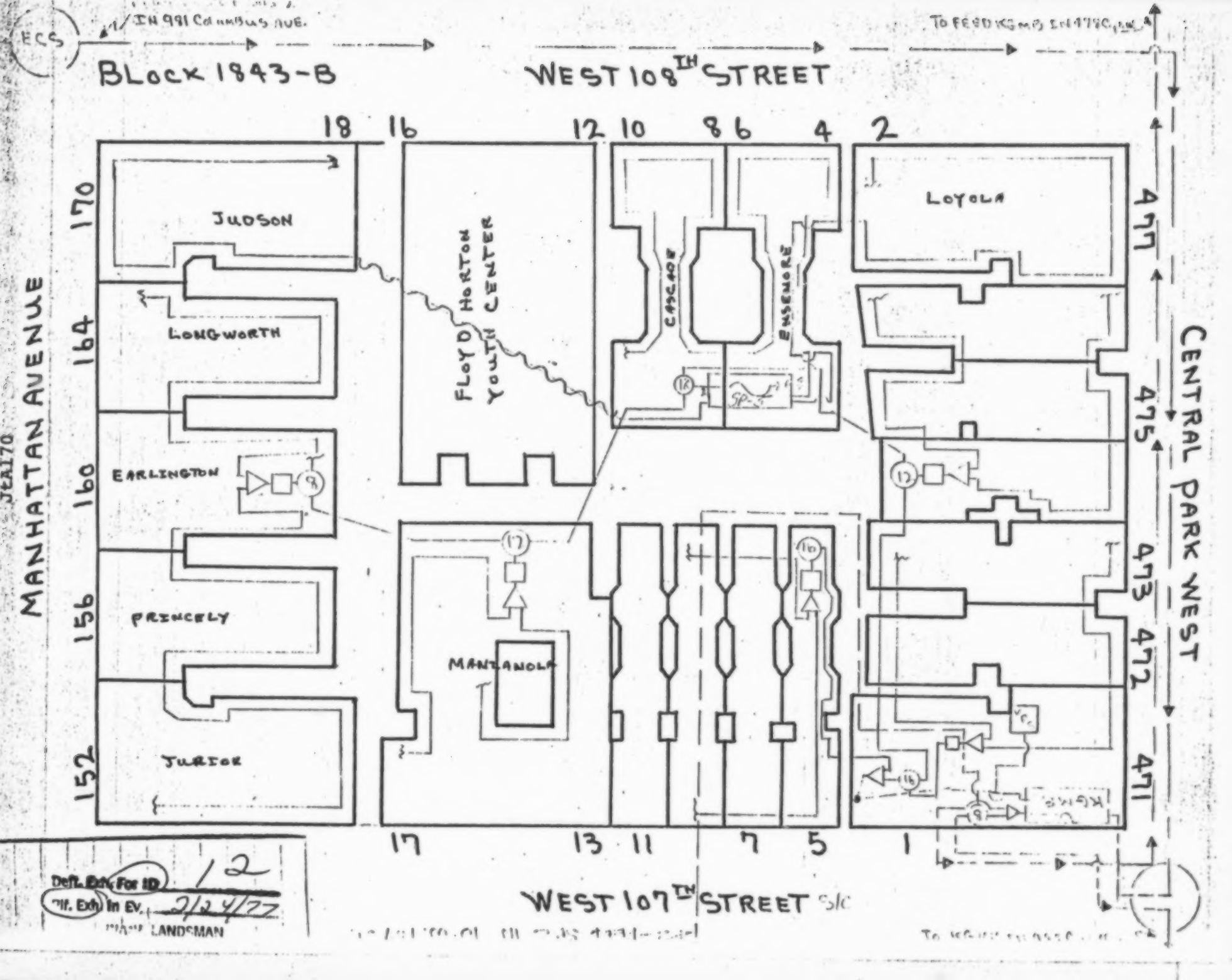
FRONT

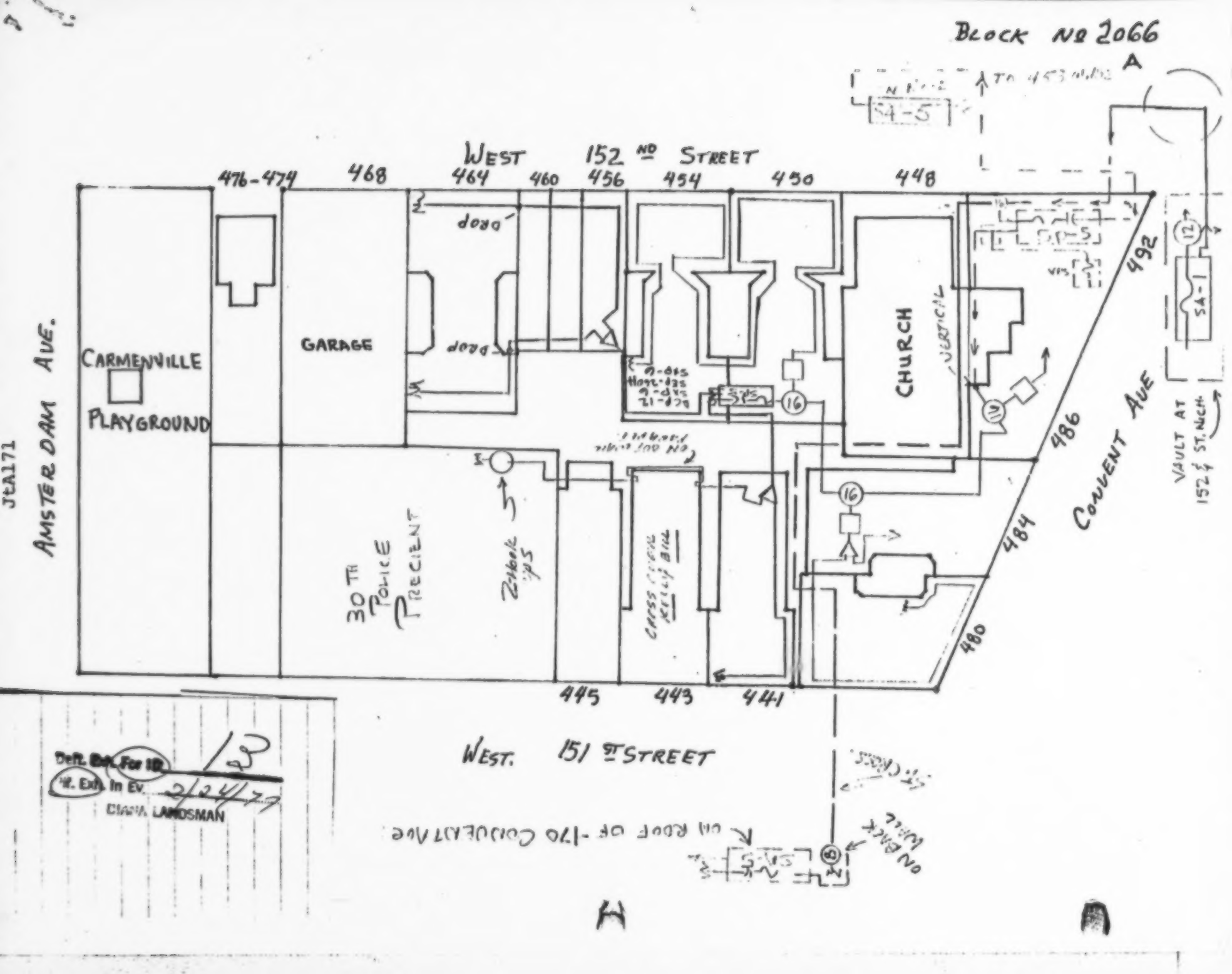


NO.	REVISION	DATE	BY

TELEPROMPTER MANHATTAN C.A.T.V. CORPORATION, NEW YORK, N.Y.

ENGINEERING DEPT.	BLOCK 122.5	LOT
TITLE 143-133 WEST 9TH ST		
DATE 5-4-77	SCALE	DWG NO.
DRAWN BY JM	APPROVED BY	FOREMAN / DATE


ECS
TO FEEDER IN 178C, 179C
IN 991 COLUMBUS AVE.
BLOCK 1843-B
WEST 108TH STREET
18
16
12
10
8
6
4
2
170
164
160
156
152
JUDSON
LONGWORTH
EARLINGTON
PRINCELY
JUDSON
FLOYD HORTON YOUTH CENTER
CASCADE
ENSENORE
LOYOLA
MANHATTANOLA
MANHATTAN AVENUE
CENTRAL PARK WEST
477
475
473
472
471
17
13
11
7
5
1
WEST 107TH STREET
Defl. Exh. For ID 12
Plf. Exh. In Ev. 2/24/77
LANDSMAN


BLOCK NO 2066
A
TO 453 W. 152
S4-5
WEST 152 ND STREET
476-474
468
464
460
456
454
450
448
492
486
484
480
CARMENVILLE
PLAYGROUND
GARAGE
CHURCH
VERTICAL
S4-1
VAULT AT 152½ ST. NEW
AMSTERDAM AVE.
CONVENT AVE
30TH POLICE PRECIENT
445
443
441
WEST. 151 ST STREET
Deft. Exh. For ID.
W. Exh. In Ev. 2/24/77
CLERK LANDSMAN

Motion to Dismiss or Affirm

1

Office-Supreme Court, U.S.
FILED
SEP 8 1981
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981
Docket No. 81-244

JEAN LORETTO, on behalf of herself and all others similarly situated,

Appellant,

v.

TELEPROMPTER MANHATTAN CATV CORP., TELEPROMPTER CORPORATION and CITY OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

MOTION TO DISMISS OR AFFIRM OF MUNICIPAL APPELLEE

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Corporation Counsel of
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LEONARD KOERNER
JOHN C. BRENNAN

of Counsel.

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IN THE
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ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

MOTION TO DISMISS OR AFFIRM OF MUNICIPAL APPELLEE

Statement

The appellee City of New York moves to dismiss the appeal herein, or, in the alternative, to affirm the final order of the Court of Appeals of the State of New York entered May 7, 1981 on the ground that the question presented is so unsubstantial as not to need further argument.

Question Presented

Is a state statute which prohibits landlords from interfering with the installation of cable television components on their property, or from exacting compensation from tenants or cable television companies for permitting such installation, a valid exercise of the State's police power.

Facts

The facts of this case are set forth in the motion to dismiss or affirm submitted by appellees Teleprompter Manhattan CATV Corp. and Teleprompter Corporation ("Teleprompter defendants") and will not be repeated here.

Opinions Below
New York Court of Appeals
53 NY 2d 124 (1981)

The Court found that the purpose of the statute, the rapid development and maximum penetration of cable television "is a legitimate

purpose for use of the police power" (A40) and that the challenged provisions "are reasonably and substantially related to that purpose." (A40). The Court further held that the State was not acting to further any governmental program but instead sought "to adjust the benefits and burdens of economic life to promote the common good" (A45); that the economic impact of the statute was insufficient to invalidate it since plaintiff was not deprived of a fair return from her property, and that her reasonable investment backed expectations were not frustrated. The Court concluded that the challenged statute was a valid exercise of the State's police power rather than a taking a requiring compensation.

Appellate Division
73 A.D. 2d 849

The Appellate Division, First Department unanimously affirmed without opinion.

Supreme Court, Special Term
98 Misc. 2d 944

At Special Term, the Court granted separate motions for summary judgment by the Teleprompter defendants and by the City of New York. The Court declared that Executive Law §828(1)(b) "represents a reasonable and, therefore, justifiable exercise of the police power of the State both with respect to cable TV components placed directly on premises serviced by Teleprompter and premises on which equipment is placed to service another building." (A123-4). The Court noted that plaintiff did not contend that the attachment of Teleprompter's components had an adverse economic impact on the income-producing potential of her rental premises. (A124).

ARGUMENT

THE CHALLENGED STATUTE IS AN EFFORT TO BALANCE COMPETING ECONOMIC INTERESTS, RATHER THAN AN APPROPRIATION OF PRIVATE PROPERTY FOR GOVERNMENTAL USE. SINCE THERE IS NO SHOWING OF SUBSTANTIAL ECONOMIC IMPACT ON APPELLANT OR FRUSTRATION OF HER REASONABLE INVESTMENT BACKED EXPECTATIONS, THE STATUTE IS A VALID EXERCISE OF THE STATE'S POLICE POWER.

In recent cases involving the distinction between compensable taking and valid police power exercise, this Court has accorded critical significance to three factors: the character of the governmental action, its economic impact, and its inferference with reasonable investment backed expectations. Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980); Kaisar Aetna v. United States, 444 U.S. 164 (1979).

In analyzing the character of the challenged regulation, the New York Court of Appeals in the instant case relied on traditional principles of eminent domain that have been

applied by this Court in a number of recent cases. Thus, the New York Court held that, unlike United States v. Causby, 328 U.S. 256 (1946), the government had "not acted in furtherance of any governmental program normally carried on by government" (A45). The New York Court also relied on Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978), in which this Court noted that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, e.g., United States v. Causby, 328 U.S. 256 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good".

Here there is no physical invasion by government. Nor is the State acting in furtherance of any governmental enterprise or function. Rather, the challenged statute seeks to

balance the competing interests of landlords and tenants, so that tenants have the same access to cable service as individual homeowners. This clearly constitutes an adjustment of "the benefits and burdens of economic life to promote the common good."

After noting the absence of either significant economic impact or frustration of reasonable investment backed expectations, the New York Court held that there was no compensable taking.

The crux of the appellant's argument is that every statute authorizing a "physical invasion" -- no matter how insubstantial -- of private property by another party constitutes a per se taking so as to entitle the property owner to just compensation, and that further inquiry into economic impact or investment backed expectations is unnecessary. This simplistic and antiquated approach represents a clear departure from recent

cases of this Court delineating the boundaries between eminent domain and regulation.*

It is true that this Court has often given great weight to the fact that an act of government could be characterized as a "physical invasion". But such cases invariably involve invasion by government, and the Court has made clear that the significance of the physical invasion lay in the fact that it was carried out by government in furtherance of a governmental purpose. See, for example, Penn Central Transportation Co. v. New York City, supra, 438 U.S. at 124 ("A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government") (emphasis supplied); United States v. Causby, supra, 328 U.S. at 264-5 ("[I]f the United States erected an elevated

*Indeed, this Court has expressly recognized that no set formula exists for determining when a taking has occurred. Penn Central, supra, 123-128; Andrus v. Allard, 444 U.S. 51 (1979)

railway over respondents' land of the precise altitude where its planes now fly, there would be a partial taking....")(emphasis supplied).

Where physical invasion is by private parties, rather than by government in pursuit of a governmental purpose, the Court has held that the act of invasion is not determinative. In Pruneyard Shopping Center v. Robbins, 447 U.S. 74 (1980), the Court upheld the validity of a California state constitutional provision which prevented the owner of a shopping center from denying access to individuals who wished to solicit signatures for a petition.* The Court held that "the fact that [the

*Notwithstanding the fact that Pruneyard involved an issue of free speech, it is indistinguishable from the case at bar. The Pruneyard Court recognized that the appellees had no federal constitutional right to solicit signature at a private shopping center (447 U.S. at 81.), and treated the state constitutional provision, which it said went beyond the rights conferred by the First Amendment as equivalent of a state statute for purposes of the appeal. 447 U.S. at 79. Thus, as in the case at bar, the Court was faced with deciding the validity of a state law authorizing a physical invasion of private property by individuals other than the government.

appellees] may have 'physically invaded' appellants' property cannot be viewed as determinative." 477 U.S. at 84. The Court concluded that "appellants have failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state authorized limitation of it amounted to a 'taking'." 447 U.S. at 84.

The Court in Pruneyard also distinguished the situation before it from another "physical invasion" case, Kaiser Aetna v. United States, 444 U.S. 164 (1979), in which the government attempted to open to the public a private pond that had been dredged to provide access to navigable water. In discussing Kaisar Aetna, the Pruneyard Court stated (447 U.S. at 84):

> Kaisar Aetna was a case in which the owners of a private pond had invested substantial amounts of money in dredging the pond, developing it into an exclusive marina, and building a surrounding marina community....

> "The Government's attempt to create a public right of access to the improved pond interfered with Kaisar Aetna's 'reasonable investment backed expectations.' We held that it went so far beyond ordinary regulation or improvement for navigation as to amount to a taking'." [citing Kaisar Aetna, 444 U.S. at 178]

Even in cases where the physical invasion was caused by government activities the Court has made it clear that the degree of economic harm is a significant factor in determining whether a taking has occurred. See, for example, United States v. Causby, supra, involving flights of government planes over private land where the Court held that "flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." 328 U.S. at 266. The Court in Causby (328 U.S. at 266) relied upon United States v. Cress, 243 U.S. 316, 328 (1916), which involved flooding by government of private property,

where the Court noted that "it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking" (emphasis supplied). Causby was later discussed in Griggs v. Allegheny County, 369 U.S. 84, 88 (1961), where the Court stated that Causby "held that the United States by low flights of its military planes over a chicken farm made the property unusable for that purpose and that therefore there had been a 'taking'...." (emphasis supplied)

Thus, in order to prevail, plaintiff must demonstrate significant economic impact and frustration of reasonable investment backed expectations. She has shown neither. The economic impact of having a wire strung across the roof of one's premises is insignificant, especially when contrasted with regulations of

far more serious economic consequence that have been sustained by this Court. See, for example, Penn Central, supra. Rather, the stringing of 1/2 inch wires across the roof of appellant's apartment building constitutes at most a minimal interference with private property and is of no economic consequence.

Nor can plaintiff seriously claim frustration of her reasonable investment backed expectations. If the phrase is to have any meaning at all it must be interpreted to mean investment with a particular purpose or expectation is mind. It cannot, as appellant suggests (jurisdictional statement, pp. 58-61) simply mean that a person who invests money expecting to earn a return cannot be deprived of incidental income which was not a significant factor in his decision to invest. The economic viability of her property remains fully intact. She has demonstrated no more than nominal damage

to her property, and is in no way deprived of the intended use of her property, i.e., the rental of apartments to tenants. Indeed, the appellant is deprived of nothing, save the "right" to demand of tenants and cable companies unreasonable and unjustified fees for the right to deliver or receive cable service. This hardly constitutes an oppressive interference with reasonable investment backed expectations.

CONCLUSION

THE APPEAL HEREIN SHOULD BE DISMISSED OR, IN THE ALTERNATIVE, THE ORDER APPEALED FROM SHOULD BE AFFIRMED, WITH COSTS.

Respectfully submitted,

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Motion to Dismiss or Affirm 2

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No. 81-244

IN THE

Supreme Court of the United States

October Term, 1981

JEAN LORETTO, on behalf of herself and all others similarly situated,

Appellant,

v.

TELEPROMPTER MANHATTAN CATV CORP., TELEPROMPTER CORPORATION and CITY OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

MOTION OF APPELLEES TELEPROMPTER CORPORATION AND TELEPROMPTER MANHATTAN CATV CORP. TO DISMISS OR AFFIRM

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Appellant,

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TELEPROMPTER MANHATTAN CATV CORP., TELEPROMPTER CORPORATION and CITY OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

MOTION OF APPELLEES TELEPROMPTER CORPORATION AND TELEPROMPTER MANHATTAN CATV CORP. TO DISMISS OR AFFIRM

Statement

Appellees Teleprompter Corporation and Teleprompter Manhattan CATV Corp. (collectively "Teleprompter"),* pursuant to Rule 16 of the Rules of the Supreme Court of the United States, as amended, respectfully move to dismiss appellant's appeal from the order of the New York Court of Appeals (the "Court of Appeals"), dated and entered on May 7, 1981, or to affirm such order summarily, on the ground that the question presented is so unsubstantial as not to warrant further argument.

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* For the listing of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of Appellees, see Appendix A.

Question Presented

Whether the New York Court of Appeals correctly held that Section 828 of the Executive Law of the State of New York ("Section 828")—which provides that a landlord shall allow the installation of cable television facilities (in this case 30 feet of ½ inch diameter cable and two 4 cubic inch directional taps) upon his property subject to conditions that (a) insure the safety, functioning and appearance of the premises, (b) require the cable television company or tenant to bear the entire cost of installation, operation and removal of the facilities, and (c) provide for indemnification for any damage caused by installation, operation and removal of the facilities, and further provides for payment to the landlord for such installation of a fee determined by the New York State Commission on Cable Television (the "Commission")—is a constitutional exercise of the state's police power.

Statement of the Case

Proceedings Below

The complaint alleged, in pertinent part, that, by placing cable television components on appellant's apartment building, Teleprompter had committed a trespass; that Teleprompter committed such acts under Section 828; and that Section 828 thus authorized a taking of property without just compensation and a deprivation of property without due process of law in violation of the United States Constitution.*

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* The action was declared a class action, but based upon a consideration of the relative merits of the claims and defenses, the class action order provided that appellant pay for all costs of notice to the class. Subsequently, by consent order entered on July 6, 1977, the class was narrowed from all owners of real property in New York State on which Teleprompter had placed cable telvision components to exclude owners of single family dwellings. The parties also agreed to postpone notification of the class to abide the determination of the motion and cross-motion for summary judgment.

In its answer, Teleprompter denied the complaint's material allegations and alleged various affirmative defenses.

After pretrial discovery, the parties moved and cross-moved for summary judgment at Special Term, Part I of the Supreme Court, New York County. That court granted summary judgment and dismissed the complaint holding that Section 828 "represents a reasonable, and therefore, justifiable exercise of the police power of the State both with respect to cable TV components placed directly on premises serviced by Teleprompter and premises on which equipment is placed to service another building" (123a-124a),* and that "[t]here is no question that the obvious public advantage sought to be served by the legislation under attack greatly outweighs the insignificant nature of the physical use of private property permitted by the statute" (124a), especially since it was not even "contended that such use has an adverse economic impact on the income-producing potential of rental premises" (124a).

The Appellate Division, First Department, unanimously affirmed without opinion (110a-111a).

The Court of Appeals also affirmed in an exhaustive and scholarly opinion. It noted that appellant "makes no claim that she is not receiving a fair return from the property" (57a); that her complaint is simply "that an area of the building for which she does not claim to have any other use may not be used for the benefit of her tenants because without the statute she would be able to obtain a fee from the CATV company, payable in the last analysis, by the tenant" (57a); and that Section 828 was enacted "in order to protect the right of the tenants of rental property, who will

* Numbers in parentheses preceding the letter "a" refer to pages of the appendix following appellant's Jurisdictional Statement.

ultimately have to pay any charge a landlord is permitted to collect from the cable TV company, to obtain cable TV service in their respective apartments" (69a). The court held that the "bases upon which the Legislature may [enact such legislation] are its power to regulate landlord-tenant relationships and its power to encourage development of an educational and communications medium" (69a); that in enacting Section 828 "the State takes nothing for itself as entrepreneur" (69a); and that "the physical invasion of the landlord's property by the attachment of [CATV] facilities [did not] invalidate the legislative exercise of the police power, in view of the minimal nature of the invasion and the absence of any reasonable expectation on the part of the landlord that the space thus utilized (or invaded) would ever be income productive" (72a-73a).*

Facts

Parties

Appellant owned an apartment building located in the City at 303 West 105th Street. In late 1978, she sold the building.

At that time Teleprompter Corp. operated nine cable systems in New York State serving over 120,000 subscribers. Teleprompter Manhattan operated the cable television system in the northern half of Manhattan which then served about 50,000 subscribers.

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* In a separate opinion, Judge Gabrielli concurred on the ground that the legislature had provided a mechanism for ensuring just compensation for any taking which occurred (73a-76a). Of course, under traditional condemnation principles, only nominal damages are appropriate where, as here, the landlord does not suffer any harm by virtue of the installation of the cable television equipment. (See *infra*, p. 8, fn. ***.) Moreover, as Judge Gabrielli stated, under the statutory scheme "it is obvious that the landlord who actually incurs damage to his property or is restricted in the use to which he might put that property will receive compensation commensurate with the greater injury" (75a).

Background

Since cable television systems have multi-channel capacity, they change the way Americans communicate with each other. The *Report to the President of the Commission on Cable Communication* (1974) noted that (pp. 9-10, 15):

> Cable development has the potential of creating an electronic medium of communications more diverse, more pluralistic, and more open, more like the print and film media than our present broadcast system. It could provide minority groups, ethnic groups, the aged, the young, or people living in the same neighborhood an opportunity to express, and to see expressed their own views. Yet it would also enable all of these groups to be exposed to the view of others, free of the homogeneity which characterizes contemporary television programming.*

The franchises under which Teleprompter operates require delivery of numerous services in the public interest. For example, the Teleprompter Manhattan franchise re-

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* This potential is well on the way to being realized. Modern cable television systems offer two-way capability (for such functions as instant opinion polling, security and emergency alert services, energy management, and at-home banking) and over 100 video channels. In addition, there has recently been an enormous expansion in the television programming available to the cable industry. Already being offered are numerous "pay cable" services (carrying primarily movies and sports), a 24-hour video news service (with another competitive service recently announced), various cultural services featuring ballet, opera and serious drama, several different children's services, two services devoted exclusively to sports, services aimed at various ethnic groups such as the Black Entertainment Network and the Spanish International Network, and gavel-to-gavel coverage of proceedings of the United States House of Representatives. As required by various provisions of its franchise agreement with The City of New York, Teleprompter Manhattan has begun upgrading its system to the current state of the art.

quires it (a) to transmit without charge City-originated programs, (b) to provide access channels without charge to the public on a first-come, first-served basis, (c) to provide free connections to hospitals, public schools, day-care centers and similar institutions, and (d) to provide service throughout the franchise area at the same charge without regard to the economic feasibility of service to any particular location.

The Installation of Cable at 303 West 105th Street

In 1968, Teleprompter Manhattan entered into an agreement with Sharie Wald, who then owned the property at 303 West 105th Street. Teleprompter Manhattan paid her $50.00 and was given the right to furnish cable television service to the tenants.

In June 1970, Teleprompter Manhattan attached in the front and back of the roof, about 18 inches from the roof top, approximately 30 feet of black coaxial cable, slightly less than ½ inch in diameter. It also attached two 4 cubic inch directional taps.

In March 1971, appellant, a licensed real estate broker with substantial experience in purchasing brownstones and similar apartments, bought this building from Sharie Wald. Thereafter, Teleprompter Manhattan connected lines to provide cable television service to two of the tenants.

The Statutory Provisions at Issue

In 1972, the New York Legislature enacted Article 28 of the Executive Law (§§ 811 *et seq.*), which became effective January 1, 1973.

Section 811, explicitly entitled "Declaration of legislative findings and intent" provided, *inter alia*, that cable

television operations involve "vital business and community service, and, therefore, are of state concern"; that the purpose of the legislation was to assure "maximum penetration" of cable television service "as rapidly as economically and technically feasible"; and that "municipalities and the state would benefit from valuable educational and public services."

Section 828 was specifically designed to assure that tenants have access to cable television on the same footing as homeowners. Accordingly, Section 828(1)(a) prohibits a landlord from interfering with "the installation of cable television facilities upon his property. . . ."

The Section provides, however, that the landlord may require that the installation be consistent with the "safety, functioning and appearance of the premises," that the cable company or tenants "bear the entire cost of the installation," and that the "cable company . . . indemnify [the landlord] for any damage caused by the installation. . . ."

Section 828(1)(a) also prohibits a landlord from obtaining "payment . . . from any cable television company" for "permitting cable television service" on his property "in excess of any amount which the commission shall, by regulation, determine to be reasonable."*

In enacting Section 828, the Legislature balanced the interests of tenants in subscribing to cable television as

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* Section 828 was enacted in recognition that landlords were impeding the development of cable television by often exacting exorbitant fees from the cable companies. Joseph Swidler, Chairman of the New York State Public Service Commission, testified on this point before the Joint Legislative Committee considering Article 28 of the Executive Law:

> As you know, landlords in many instances have imposed extremely onerous fees and conditions on cable access to their buildings. . . . Legislation is necessary, however, to prohibit gouging and arbitrary action (33a).

against those of the landlords, and concluded that the rights of the former class were more deserving of protection. The *Jones Report*,* which provides the crucial legislative history on this statute, is explicit on this point:

> ... [T]he interest [of the landlord] intruded upon is a wholly abstract one—given the conditions specified, the landlord's interest consists entirely of insisting that some negligible unoccupied space remain unoccupied. The tenant's interest clearly is more substantial, consisting of a right to receive (and perhaps send) communications from and to the outside world.

On October 29, 1973, the Commission adopted rules promulgating an administrative procedure for a landlord to apply for a fee pursuant to Section 828 (1)(b).**

In its Statement of General Policy issued in 1976, the Commission decided that the landlord's fee should equal the compensation received in a condemnation proceeding. It concluded on the basis of submitted condemnation appraisals, however, that cable television easements (involving only "negligible unoccupied space") typically had only nominal value and, therefore, that in the typical case only nominal compensation was appropriate.***

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* W. K. Jones, *Regulation of Cable Television by the State of New York* (1970) (hereinafter the "Jones Report") was relied upon by the governor's memorandum issued when he signed the bill enacting Article 28 of the Executive Law. McKinney's Session Laws of New York, 1972 pp. 3395-96.

** Appellant never applied to the Commission for a fee for Teleprompter's installation of cable television components on her property.

*** This view is undoubtedly correct for the universally applied rule in condemnation is that "just compensation in the constitutional sense is what the owner has lost, and not what the condemnor has gained." Nichols, *The Law of Eminent Domain*, 3d Ed., § 8.61 (1977).

Appellant has admitted that she did not lose the use of any part of her property because of Teleprompter's cable television equipment. When asked at her deposition if it were appellant's "present wish" that Teleprompter remove the equipment from her building, appellant testified: "That is a hard one to answer. I have good tenants. I don't want to upset them."

ARGUMENT

The Questions Raised By Appellant Are So Unsubstantial As Not To Warrant Further Argument.

1. Introduction

Appellant's primary argument on this appeal is that Section 828, by authorizing the installation of cable equipment upon her property, is a "*per se* taking requiring compensation" under the Fifth and Fourteenth Amendments because it sanctions a "physical occupation" of her property, and that the Court of Appeals' decision thus represents a "revolutionary change in the law of eminent domain" (Jurisdictional Statement, p. 17).*

In fact, the Court of Appeals' opinion falls well within numerous decisions of this Court. This Court has frequently held, contrary to appellant's argument, that every physical invasion does not invariably and inflexibly require compensation. See *e.g.*, *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74 (1980); *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979); *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104 (1978), *reh. den.*, 439 U.S. 883 (1978). These, and other cases discussed below, clearly demonstrate that the

* Appellant also urges that even if Section 828 is viewed as a police power enactment, it is invalid as a deprivation of property without due process. This contention is addressed herein at pages 24-27.

issues raised by appellant are insubstantial and warrant no further argument.

2. Section 828 Is a Traditional Police Power Statute.*

Section 828 does not effect a taking requiring compensation, as appellant contends, merely because a cable of one-half inch diameter is placed on the roof of a landlord's building.

Section 828 authorized cable television companies to install cable equipment on a landlord's property in order to assure the widespread availability of cable television service to tenants and thereby to improve public education and information (see Section 811). The state thus acted in its arbitral capacity to regulate the use of private property between the landlords' "abstract" interest in "insisting that some negligible unoccupied space remain unoccupied" and the tenants' "substantial" interest in the "right to receive (and perhaps send) communications from and to the outside world" (see *Jones Report*, quoted p. 8, *supra*). Accordingly, Section 828 was a traditional exercise of the state's police power.

In the recent *Penn Central*, *Kaiser Aetna* and *Prune-Yard* cases,** this Court identified several factors to be weighed in determining whether legislation is to be judged

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* Although Section 828(1)(b) and the Rules of the Commission promulgated thereunder provide for a reasonable fee for a landlord upon application to the Commission, Section 828 remains a police power statute. Not every exercise of the police power that includes a provision relating to compensation is an exercise of the power of eminent domain, or constitutes a taking (see *Fred F. French Investing Co.* v. *City of New York*, 39 N.Y.2d 587 (1976), *app. dism'd* and *cert. den.*, 429 U.S. 990 (1976)).

** As discussed below (pp. 21-24), there are also several earlier cases in which invasions of private property authorized by government, but not used directly for governmental entrepreneurial purposes, have been upheld as valid exercises of the police power.

as an exercise of the police power or as a taking statute requiring compensation. As shown below, each of these cases confirms that a direct physical invasion is not dispositive of the taking/police power question, and, when analyzing the factors relied on by this Court, it is clear that a taking has not occurred in this case. Indeed, as the Court of Appeals noted and as shown below, *PruneYard* is "on all fours with the instant case" (64a).

a. Penn Central

In *Penn Central*, this Court upheld a Landmarks Preservation Law, pursuant to which Grand Central Terminal was designated as a landmark. The effect of this designation was to prevent the owners of the Terminal from erecting an office building on top of the Terminal, thereby depriving them of $150 million in future rent. The owners sued, claiming that by virtue of the Landmarks Law, the City had taken their property without just compensation.

In rejecting the owners' contention, this Court described the resolution of the taking/police power question as an *ad hoc*, factual inquiry based "upon the particular circumstances [in that] case." 438 U.S. at 124.*

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* This Court further stated (*id.* at 123-24):

> *The question of what constitutes a "taking"* for purposes of the Fifth Amendment *has proved to be a problem of considerable difficulty.* While this Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *this Court, quite simply, has been unable to develop any "set formula"* for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. Indeed, we have frequently observed that *whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances* [in that] case." (Citations omitted; emphasis supplied.)

The first factor identified as bearing on the issue was "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations. . . ." *Id.* This Court held that such expectations were not interfered with in *Penn Central* because "[u]nlike the governmental acts in [other cases; citations omitted], the New York City Law does not interfere in any way with the present use of the Terminal" (*id.* at 136).

The second factor discussed in *Penn Central* in analyzing the taking/police power distinction was the character of the governmental action. Where the government directly enters the property there is a greater likelihood that a taking will occur. Nevertheless, contrary to the theory of appellant in this case, the mere fact that there has been a direct entry upon the property does *not* result, in and of itself, in a taking (*id.* at 124):

> A "taking" *may* more readily be found when the interference with property can be characterized as a physical invasion by government, see, *e.g., United States* v. *Causby,* 328 U.S. 256 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good. (Emphasis supplied.)

That a physical invasion does not inevitably result in a taking of property is further shown by this Court's explanation that the law does not focus on each square inch of property to ascertain if any minute part has been wholly appropriated (*id.* at 130):

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have

> been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather *both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.* . . . (Emphasis supplied.)

Finally, this Court noted as one of the significant factors in distinguishing between a taking and police power that "government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute 'takings.'" *Id.* at 128, citing *United States* v. *Causby*, 328 U.S. 256 (1946).

In *Causby*, direct overflights by military aircraft above the claimant's land destroyed its use as a chicken farm. This Court noted in *Penn Central* that it held in *Causby* that such overflights had effected a taking, not as appellant urges simply because there was a physical invasion, but because the "*Government* had not 'merely destroyed property [but was] using a part of it for the flight of *its* planes.'" 438 U.S. at 128 (emphasis supplied). The Government was thus acting in its enterprise or exploitative capacity.

In *Penn Central*, the owners of the Grand Central Terminal urged that the Landmarks Law had effected a taking as in *Causby*. This Court rejected the argument because the government was not acting in its enterprise or exploitative capacity appropriating the appellants' property for a governmental purpose (*id.* at 135):

> . . . [T]he *Landmarks Law neither exploits appellants' parcel for city purposes nor facilitates nor arises from any entrepreneurial operations of the*

> *city. The situation is not remotely like that in Causby where the airspace above the property was in the flight pattern for military aircraft.* The Landmarks Law's effect is simply to prohibit appellants or anyone else from occupying portions of the airspace above the Terminal, while permitting appellants to use the remainder of the parcel in a gainful fashion. This is no more an appropriation of property by government for its own uses than is a zoning law. . . . (Emphasis supplied.)

This Court's recognition of the significance to the taking question of government acting in its enterprise or exploitative capacity supports the analysis employed by the Court of Appeals in *Lutheran Church in America* v. *City of New York*, 35 N.Y.2d 121 (1974) and *Fred F. French Investing Co.* v. *City of New York, supra.* In those cases, the Court of Appeals focused on whether government was acting in its enterprise capacity or whether it was merely adjusting (or arbitrating) competing interests in land.*

Applying the arbitral-enterprise distinction in the instant case, the Court of Appeals observed (45a-46a):

> Here, the State has acted not in furtherance of any governmental program normally carried on by government (such as the aircraft flights involved in *United States* v. *Causby*, 328 U.S. 256). Rather, it seeks in the interest of education and the development of an additional system of communication to adjust "the benefits and burdens of economic life to

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* This approach was first suggested by Professor Sax in *Taking and the Police Power*, 74 Yale L.J. 36, 37-38 (1964), where he described the physical invasion theory relied on by appellant as "formalistic" and "preposterous."

promote the common good" (*Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 124, *reh. den.*, 439 U.S. 883). It acts as arbiter not as entrepreneur.

Applying the principles of *Penn Central* here, it is obvious that Section 828 is a non-compensable exercise of the state's police power.

Unlike *Penn Central*, where appellants were denied the right to realize over $150 million in rents by exploiting the air-space over the Terminal, Section 828 has no adverse effect whatsoever on the value or use of appellant's property. In fact, appellant apparently recognized that the installed cable components enhanced her property's value.* In any event, as the Court of Appeals stated, appellant had no alternate use for the small space on her roof utilized by the components and she would have not used the property differently if the equipment had not been placed there (57a).

Moreover, Section 828 involves no physical invasion of appellant's property by government, nor is the government acting in its enterprise capacity. Section 828 is an expression of the government's governing—that is, the legislature is mediating a dispute between landlords on the one hand, and tenants on the other, and resolving their competing interests in the use of apartment houses. Section 828 is not qualitatively different from the situation where the legislature has arbitrated, under its police power, other disputes between the landlords and tenants, such as those involving rent control or certain standards for health and safety. See *Block* v. *Hirsh*, 256 U.S. 135 (1921) and the cases cited at p. 24 fn.** *infra*.

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* Appellant declined to request that the cables be removed, testifying that such removal might "upset" her tenants.

b. PruneYard

In *PruneYard*, another very recent case, this Court unequivocally held that a physical invasion of property is not determinative of the taking/police power question.

There, high school students sought to solicit support for their opposition to a United Nations resolution against Zionism. They set up a table in a central courtyard of PruneYard, a privately-owned shopping center, and distributed pamphlets and asked passersby to sign petitions.

After the students began soliciting signatures, they were told that they had to leave because their activity violated PruneYard regulations. They left, and filed suit seeking to enjoin PruneYard from denying them access to the shopping center. The California Supreme Court held that under the California Constitution the students were entitled to conduct their activity on PruneYard property and that such result did not infringe property rights protected by the Federal Constitution.

This Court affirmed, holding that permitting the students to enter PruneYard to exercise such rights clearly "does not amount to an unconstitutional infringement of appellants' property rights under the Taking Clause." 447 U.S. at 83. This result was reached despite the recognition that "one of the essential sticks in the bundle of property rights is *the right to exclude others*" (emphasis supplied), and that "there has literally been a 'taking' of that right to the extent that the California Supreme Court has interpreted the State Constitution to entitle is citizens to exercise free expression and petition rights on shopping center property." *Id.* at 82.

The owners, like appellant here, urged that there was a *per se* compensable taking because the California Constitu-

tion authorized a direct entry on the shopping center. This Court flatly rejected that contention, stating that "the fact that [the students] may have 'physically invaded' appellants' property cannot be viewed as determinative" of a taking. *Id.* at 84. Instead, whether or not there had been a taking was analyzed by reference to the state's police power (*id.* at 81):

> It is, of course, well established that a State in the exercise of its police power may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision.

In determining whether the physical invasion interfered with PruneYard's use of its property so as to effect a taking in the constitutional sense, this Court looked to the factors identified in *Penn Central* (*id.* at 83):

> This examination entails inquiry into such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations.

In holding that there was no such taking, the *PruneYard* Court relied on the minimal economic effect of the entry on appellants' investment-backed expectations (*id.* at 84):

> . . . [A]ppellants have failed to demonstrate that the "right to exclude others" is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a "taking."

Thus, *PruneYard* unambiguously holds that the taking/police power issue must be resolved by analyzing the factors identified in *Penn Central* and not by mechanistically focusing solely on whether there has been a direct entry on property. And, after making the analysis, this Court unanimously concluded that notwithstanding a "physical invasion," there had been no taking. As the Court of Appeals correctly noted, *PruneYard* is "on all fours with the instant case" (64a)*

c. Kaiser Aetna

Kaiser Aetna is yet another recent decision of this Court demonstrating that the determination whether a direct physical entry has taken place is not dispositive of the taking issue. That case is not, as appellant states (Jurisdictional Statement, pp. 21-22), an endorsement of a rule that a physical occupation is a *per se* taking.

In *Kaiser Aetna*, the owners of a private pond had invested millions of dollars in dredging the pond, developing it into an exclusive marina and building a surrounding

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* Recognizing the significance of *PruneYard*, appellant tries to limit its holding by characterizing it as involving the First Amendment rights of the students (Jurisdictional Statement, p. 33). But the students' First Amendment rights were not before this Court because the California Supreme Court had "interpreted the *State* Constitution to entitle its citizens to exercise free expression and petition rights on shopping center property" (447 U.S. at 82, emphasis supplied). The only First Amendment question considered by this Court was whether the *shopping center owner* had a First Amendment right "not to be forced by the State to use his property as a forum for the speech of others" (447 U.S. at 85). This Court held that the shopping center owner had no such right. Moreover, it is worth noting that, even if *PruneYard* had involved the Federal Constitutional issue of the students' right of free speech, similar values involved in this case would support the decision below. As stated in the *Jones Report*, at stake in the enactment of Section 828 is the tenant's right to receive and send communications "from and to the outside world" (see *supra*, p. 8).

marina community (444 U.S. at 167). The marina was open only to fee-paying members, and the fees were paid in part to maintain the privacy and security of the pond. Opening the marina to the public would change the entire character of the development. The federal government sought to compel free public use of the private marina on the ground that the marina became subject to the federal navigational servitude because the owner had dredged a channel connecting it to navigable water. *Id.*

This Court held that there was a taking requiring compensation, not because there was a direct entry by government, but because of the government interference with the marina owner's investment-backed expectations. The point is emphasized in *PruneYard*, where this Court described its holding in *Kaiser Aetna* as follows (*PruneYard*, *supra*, 447 U.S. at 84, emphasis supplied):

> The Government's attempt to create a public right of access to the improved pond interfered with Kaiser Aetna's "reasonable investment-backed expectations." *We held that it went "so far beyond ordinary regulation or improvement for navigation as to amount to a taking. . . ."*

That the Court of Appeals clearly understood the teaching of *Kaiser Aetna* and *PruneYard* is evident from the following passage of its opinion (61a-63a):

> From those cases it is fair to conclude that the phrase "reasonable investment-backed expectations" refers not to the overall investment in the property, but to investment made with a now frustrated particular purpose or "expectation" in mind. Thus, in *Kaiser Aetna* there was investment in the improvement of the pond in the expectation that it would be open only to fee-paying members; in *PruneYard* no

> investment-backed expectation was found. Here, as in *PruneYard*, there is no showing of any investment made in the expectation that fees would be derived from CATV installations separate and apart from the rent normally paid by the tenant. Such income as plaintiff and other property owners derived from CATV installations prior to enactment of Section 828 arose not from any investment-backed expectation but from the combination of the owner's common law right of exclusion and the desire of tenants generally to avail themselves of CATV service, which infused value into what had previously been, as Commissioner Jones characterized it, "negligible unoccupied space." (Footnotes omitted.)*

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* Appellant claims that Section 828 interferes with her reasonable investment-backed expectations, arguing that *Kaiser Aetna* involved only $72 in annual rental fees, whereas she estimates damages to the average class member at $800. (Jurisdictional Statement, p. 51, fn.). The argument is wholly unpersuasive. *First*, in *Kaiser Aetna*, the developer, had "invested substantial amounts of money in making improvements" (444 U.S. at 176) so as to make the pond suitable for use as a marina in the expectation of receiving fees for its use. By contrast, as the Court of Appeals stated, in this case appellant made no investment "in the expectation that fees would be derived from CATV installations separate and apart from the rent normally paid by the tenant" (62a). *Second*, the two figures cited by appellant are not remotely comparable. The $72 figure represents the result of an arm's length transaction whereas the $800 figure is merely appellant's estimate of the "hold up" value which would accrue to her if her position were upheld. It has absolutely no objective reality.

Appellant also argues that Section 828 interferes directly with her investment-backed expectations because, as she puts it, "[p]rior to the effective date of Executive Law, § 828, any investor in residential rental property in New York would have invested with the legal right (and, therefore, the reasonable expectation) of receiving a surcharge under the rent control laws for usage of cable television . . ." (Jurisdictional Statement, p. 60). This is equivalent to arguing that any change in the law which adversely affects one group constitutes a taking requiring compensation. Obviously, this has never been the law. See e.g. *Miller* v. *Schoene*, 276 U.S. 272 (1928).

d. Other Cases

The principle that a "physical invasion" is not dispositive of the taking issue is not of recent vintage. Several earlier cases decided by this Court also demonstrate that not every continuous touching constitutes a taking requiring compensation.

In *Jackman* v. *Rosenblum Co.*, 263 Pa. 158 (1919), *aff'd on other grounds*, 260 U.S. 22 (1922), pursuant to a Pennsylvania statute, the defendant proposed to incorporate a wall which was part of the plaintiff's theatre into a party wall for a building it was constructing. City officials found that the plaintiff's wall was unsafe and ordered it torn down, which was done by the defendant. The plaintiff sued, arguing that, by virtue of the statute, his property had been taken without compensation.

The Pennsylvania Supreme Court held that despite a physical invasion (tearing down a wall on the plaintiff's property which caused the plaintiff to lose a season of theatrical bookings), the plaintiff was not entitled to compensation. The court upheld the statute on the ground that it was a reasonable regulation of competing uses of the property and that the state possessed under its police power the right to impose burdens upon property without compensating the owner. 263 Pa. at 172.

In *Jackman* this Court did not decide whether the statute had to invoke the state's police power. However, in affirming the Pennsylvania Supreme Court, this Court necessarily found that the statute did not effect a taking requiring compensation under the Fifth Amendment, notwithstanding the physical invasion of the plaintiff's property caused thereby.*

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* Justice Holmes, who wrote this Court's opinion in *Jackman*, later stated his view that the statute under consideration there was but an example of the "petty larceny of the police power" (see 1 Holmes-Laski Letters [Howe Ed. 1953] p. 475).

Moreover, there are numerous rent control cases decided by this Court which dispose of appellant's physical invasion argument. For example, in *Block* v. *Hirsh*, *supra*, this Court held that a federal rent control statute, which allowed a tenant to retain possession of certain premises at the rent specified in an expired lease, and which prohibited the landlord from removing the tenant, did not effect a taking of property, but was instead a justifiable regulation under Congress' police power.

Section 828 involves a far less significant invasion than the rent control statute in *Block*. As the Court of Appeals stated (67a-68a, emphasis supplied):

> To call a provision which says a landlord may not put a tenant already on his property off a regulation, but characterize as a public appropriation a statute which says that a landlord must in the interest of his tenant let someone put something on the landlord's property, is to ignore the reality that *the physical and economic effects on the landlord in the two situations are identical.* Nor does the passing reference in [a state rent control case] to compensation distinguish the cases, for plaintiff Loretto (or the successor company) is likewise entitled to reasonable apartment rent from the tenants of 303 West 105th Street and, it may be surmised, gives up a great deal less (5% of the Cable TV company's fee, according to plaintiffs) than did the landlord in [a state rent control case] (the difference in rent obtainable with and without controls in the housing crisis of a war emergency economy).

Another relevant case *is Miller* v. *Schoene*, *supra*, which even appellant recognizes does not support her *per se*

theory (see Jurisdictional Statement, p. 24 fn.*). There, the State ordered the plaintiff to cut down red cedar trees because they were infecting nearby apple trees. Nevertheless, it was held that there was no taking in *Miller*, and surely it would have made no difference in the result if the plaintiff had refused to cut down his trees and the State had entered the land to do so itself.

In *Penn Central*, this Court recognized that *Miller* was decided upon the "arbitral-enterprise" distinction discussed above, stating (438 U.S. at 126):

> The Court [in *Miller* v. *Schoene*] held that the State might properly make "a choice between the preservation of one class of property and that of the other" and since the apple industry was important in the State involved, concluded that the State had not exceeded "its constitutional powers by deciding upon the destruction of one class of property [without compensation] in order to save another which, in the judgment of the legislature, is of greater value to the public."
>
> * * * *

The essence of appellant's case is her attempt to obtain a windfall profit from the cable television companies' need to place cable on apartment buildings to achieve the legislative purpose of maximum and rapid penetration of cable television in the State. Section 828 falls well within the principles of cases such as *Penn Central*, *Miller* v. *Schoene*, *Block* v. *Hirsh*, and *Jackman* v. *Rosenblum Co.*, because, as the court below stated, unlike all those cases, appellant has not been injured; indeed she has recognized by refusing to seek its removal, that the cable installation has enhanced the value of her property (see *supra*, p. 9).

The cases show that the legislature has the undeniable power to authorize the installation of cable television

equipment on the property of landlords to benefit tenants, without providing for any compensation to landlords.* In so doing, the State takes nothing for itself. Rather, its police power is being exercised to resolve a conflict between persons with common interests in property where the legislature has found that the public welfare will be advanced by the resolution of the conflict.**

3. Section 828 Is a Valid Exercise of the State's Police Power.

The foregoing demonstrates that Section 828 is to be judged as an exercise of the State's police power. The rea-

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* Comparable statutes in Connecticut (Conn. Stats. Ann., Tit. 16, § 16-333[a]) and Massachusetts (Mass. Gen. Laws Ann., Ch. 166 A, § 22) either proscribe any payment to an owner of a multi-unit residential building or simply presume the owner's consent from delivery to him of a copy of the statute and a statement, signed by the cable television company, agreeing to be bound by it. The New York statute, as Judge Gabrielli stated, provides a mechanism for assuring that the landlord will receive appropriate compensation—even though, as we have demonstrated and the Court of Appeals held, no compensation at all is required.

** The legislature could have required landlords to bear at their own expense the cost of interconnecting their premises with Teleprompter's cable system, and such action on the part of the legislature would not have been susceptible to a successful constitutional challenge. See *Oriental Boulevard* v. *Heller*, 27 N.Y.2d 212 (1970), *app. dism'd.*, 401 U.S. 986 (1971) (requiring the installation of pollution control devices costing up to $19,000 per building), *Queenside Hills Realty Co.* v. *Saxl*, 328 U.S. 80 (1946) (requiring lodging houses to comply with new fire regulations including the costly installation of a certain sprinkler system); *Health Dept. of New York* v. *Rector, etc. of Trinity Church*, 145 N.Y. 32 (1895) (requiring landlords to provide tenants with water connections and plumbing); *Garvar* v. *City of New York*, 54 Misc. 2d 562 (Sup. Ct. Kings Co. 1967) (requiring the installation of water conservation devices at considerable expense to the building owner); *Adamec* v. *Post*, 273 N.Y. 250 (1937) (requiring apartment houses to comply with new and more stringent health and safety regulations causing added expense to owners thereof). If such major impositions, which were costly to landlords, were held to be constitutional, then *a fortiori*, the modest use of appellant's property contemplated by Section 828, utilizing facilities paid for by Teleprompter, is also constitutional.

sonableness of the statute as a police power enactment must still be tested under applicable constitutional standards.

The rule for testing the constitutional validity of a police power regulation was stated as follows in *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594-95 (1962):

> To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

All parts of this test are met.

a. Section 828 Was Enacted to Further Public Interests.

The first element of the test is designed to determine whether the enactment furthers an interest which "is in fact public." *Treigle* v. *Acme Homestead Ass'n.*, 297 U.S. 189, 197 (1936). Public interest has been held to include public health, education, safety, morals and general welfare. See *e.g.*, *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926).

Section 811 of the Executive Law and the legislative history of Article 28 make clear that the legislature intended to promote the education and general welfare of New York residents by enacting Section 828. Thus, Section 811 provided that Article 28's purpose was to "assure cable systems . . . maximum penetration in this state as rapidly as economically . . . feasible" so that "municipalities and the state would benefit from valuable educational and public services through cable television systems" and because "the public and the business community would benefit. . . ."

Moreover, Section 828 is directly addressed to so much of the landlord-tenant relationship as is involved in the

development of the cable television industry. Regulation of that relationship is a separately recognized police power purpose. *Block* v. *Hirsh, supra.*

b. The Means Employed by Section 828 Are Reasonably Calculated to Achieve Its Purpose.

The second branch of the *Goldblatt* test assesses whether the challenged statute accomplishes its purpose. Only in the absence of any reasonable nexus between a proper purpose and the means for achieving the purpose will the statute be held unconstitutional. *Goldblatt* v. *Town of Hempstead, supra,* 369 U.S. at 596. It is irrelevant that other or alternative means of achieving the same end are available. *PruneYard, supra,* 447 U.S. at 85 fn.8.

There is a clear relationship between the statutory purpose to promote cable television's growth and the means employed by Section 828. Many landlords prior to the enactment of Section 828 refused to allow cable television service to their tenants. In other cases, permission to serve the building was granted only after the cable company was forced to pay large fees to the landlord, which often were as high as 5% of the gross revenues derived by the cable company from the subscribers in the building. Section 828 provides a straight forward and effective solution to the problem.

c. Section 828 Is Not Oppressive.

There is not even an allegation in the complaint that suggests that appellant suffered anything other than nominal damages from the regulation of her right to "insist that some negligible unoccupied space remain unoccupied" (see *Jones Report,* quoted *supra,* at p. 8).

Appellant apparently did not believe that Teleprompter's cable television equipment seriously diminished the

value of her property, for she admitted at her deposition that she doubted whether she even wanted to have the equipment removed. Further, she conceded that the portion of her premises occupied by the cable television equipment would otherwise remain unoccupied.

Section 828 does not interfere with property owners' reasonable investment-backed expectations. Landlords made no investment relating to cable from which they anticipated earning profits, as the property owner did in *Kaiser Aetna, supra.* Landlords were able to extract large fees from the cable companies before the passage of Section 828 only because each building had a "hold-up" value—if the cable company could not wire the premises, its ability to develop an interconnected system was adversely affected. The value of the cable easement came not from anything done by the landlord, but from the cable company's aggregated use of many similar parcels. Thus, Section 828 only prevents landlords from extracting a windfall profit.

In summary, Section 828 is clearly a police power statute and a constitutional one as well.

Conclusion

In her Jurisdictional Statement, appellant forecasts two dangers purportedly inherent in the Court ofAppeals' refusal to adopt her theory that a direct invasion equals a *per se* taking (pp. 42-46). Appellant's first concern is that "juridical results formerly viewed as certain must be totally rethought" (*id.* at 42); the second is that "subjective issues of the degree of limitation of . . . use" (*id.* at 46) have been injected into an area of the law in which there was formerly absolute certainty. Both concerns of appellant are totally unfounded.

First, the Court of Appeals' decision herein is entirely consistent with its prior decisions and the decisions of this Court. The assertion that the cases cited on pages 43-45 of the Jurisdictional Statement have been overruled by the decision herein is not only erroneous, but also reflects a lack of appreciation for the holding in this case.

None of the cases which appellant urges must be "rethought" involved the constitutional question whether a governmental taking requiring compensation had occurred. They are cases of entry on property *without statutory authority* and thus did not involve any possible legislative enactment under the police power. In all cases, the question was merely one of interpreting an easement or deciding when entry could occur.

For example, in *Osborne* v. *Auburn Tel. Co.*, 189 N.Y. 393 (1907), the only question before the court was "whether the maintaining of telephone and telegraph poles for the purpose of stringing wires is deemed to be within the grant by the plaintiff's predecessor (to the public) of the lands for highway purposes." *Id.* at 396. In agreeing that the property owner was entitled to compensation, the court simply found that the easement did not encompass the stringing of telephone wires.

The critical difference between this case and the cases appellant fears must now be rethought is the regulatory legislation—Section 828. As was stated by the Court of Appeals (72a-73a):

> As part of its regulation of the rights of tenants and landlords and in furtherance of the development of CATV as a communications and educational medium, the Legislature may proscribe the landlords' exaction of any charge over the regular rent

> for CATV service, whether that charge be imposed directly against the tenant or indirectly by requiring payment of it by the CATV company which will in turn impose it upon the tenant.

Second, appellant's consternation (p. 42) over the fact that constitutional questions must be resolved by careful analysis and not by rigid mechanistic rules is also misplaced. It is far better to decide such questions by resorting to a factual inquiry into the circumstances of the case than by resting on formalities such as whether a physical invasion has occurred. As Professor Sax stated, the direct entry approach, although it provides for certainty (74 Yale L.J. 37-38):

> . . . reduces the constitutional issue to a formalistic quibble; an airport noise case, for example, may turn on whether the planes have physically penetrated that segment of air above the claimant's land.... *For constitutional questions to depend on such formalities is preposterous. The formal appropriation or physical invasion theory should be rejected once and for all.* (Emphasis supplied.)

For the reasons set forth above, appellees submit that this Court should dismiss the appeal or summarily affirm the order appealed from.

Dated: New York, New York
September 2, 1981

Respectfully submitted,

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Appendix

Teleprompter Manhattan CATV Corporation ceased to exist as a separate corporation on December 31, 1977 and since then has been a division of Teleprompter Corporation. Teleprompter Corporation is a wholly-owned subsidiary of Westinghouse Cable Acquisition, Inc. Westinghouse Cable is in turn wholly-owned by Westinghouse Broadcasting Company, Inc., which is a wholly-owned subsidiary of Westinghouse Electric Corporation. The following is a list of less than wholly-owned subsidiaries of Teleprompter Corporation:

Cable TV General, Inc.
Cablevision Training Center, Inc.
Focus Cable of Oakland, Inc.
Grosse Pointe Cable, Inc.
Kaiser-Teleprompter of Hawaii, Inc.
Piedmont Cablevision, Inc.
Southwest Video Corporation
El Paso Cablevision, Inc.
Telcom Cablevision, Inc.
Teleprompter Community Cablevision
Teleprompter of St. Bernard, Inc.
Teleprompter of Lorain County, Inc.
Teleprompter of Worcester, Inc.
Showtime Entertainment

The following is a list of less than wholly-owned subsidiaries of Westinghouse Electric Corporation:

Ateliers de Constructions Electriques
de Charleroi, S.A. (ACEC)

CATV Enterprises, Inc.

China Industry Services Co., Ltd.

CDSW Ireland Limited

CMW Equipamentos, Ltda. (CMWE)

CMW Sistemas, Ltda. (CMWS)

Compagnie des Dispositifs Semiconducteurs Westinghouse (CDSW)

Eletrocontroles Villares, Ltda.

Eletromar Industria Electrica Brasileira, S.A.

Eletromar Nordeste, S.A.

Ercole Marelli & Company, S.p.A.

Etic B.V.

Galileo Argentina C.I.S.A.

Galileo Uruguaya, S.A.

Home Theatre Network, Inc.

Hundt & Weber Schaltgerate GmbH

IEM S.A.

Industria IEM, S.A. de C.V.

Mex Control, S.A. de C.V.

Industry Services Company of Saudia Arabia, Ltd. (ISCOSA)

Living & Learning (Cambridge), Ltd.

Mecanica Pesada, S.A.

Mitsubishi Nuclear Fuel Co., Ltd.

Motores Electricos de Juarez S.A. de C.V.

Offshore Power Systems (a partnership)

Schneider S.A.

Silectra S.A. de C.V.

Societa Progrettiazione Reattori Nucleari, S.p.A. (SOPREN)

Transformadores de Distribucion, S.A. (TRADESA)

Transformadores TPL S.A.

Tyree Industries Limited

Tyree-Power Construction Limited

Westinghouse Asia Controls Corp.

Westinghouse Canada Inc.

Westinghouse Electric Supply Company of Saudi Arabia (WESCOSA)

Westinghouse Electro Metalurgicas C.A. (WEMCA)

Westinghouse (Jamaica) Ltd.

Westinghouse Proyectos Electricos, S.A. (WEPESA)

Westinghouse, S.A. (WESA)

Westralian Transformers Pty. Limited (W.T. Engineering Pty. Limited)

Westralian Transformers Pty. Limited (Westrans (W.A.) Pty. Limited)

Wexico Systems Services, Ltd.

Appellant's Reply Brief

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81-244

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JEAN LORETTO, on behalf of herself and all others similarly situated,

Appellant,

v.

TELEPROMPTER MANHATTAN CATV CORP., TELEPROMPTER CORPORATION and CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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October 2, 1981

(11499)

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ARGUMENT

Appellees argue that the State-sanctioned use by the corporate defendants ("Teleprompter") of private property of others for the permanent installation of CATV cables and related equipment running along rooftops from building to building* presents an

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*In their characterization of the question presented, as well as elsewhere, Appellees ignore the nature of the installations, which is that the roofs of buildings around an entire city block are utilized by Teleprompter as a "highway" for the installation of cables to facilitate service not only to the buildings on which they are placed but to other buildings along the circuit as well. We view this effective imposition of easements as raising an even more egregious constitutional issue than would be the case had Teleprompter brought its cables into each premise directly from the street, as is generally done by other utilities.

Teleprompter incorrectly characterizes the class-action order so as to further suppress the "highway" nature of its installations. (Teleprompter Motion p. 2n). In fact the exclusion of the owners of single family dwellings from the class applies only to non-cross-over situations. (A130; Jurisdictional Statement p. 13).

insubstantial constitutional issue in light of precedents of this Court. In fact, analysis of the cases cited by Appellees will confirm that there is no precedent in this Court supporting the decision of the Court of Appeals herein.

Appellant's Jurisdictional Statement (cited herein as "JS") satisfactorily answers most points raised by Appellees. We will focus here only on points not previously addressed.

(1)

Appellees place principal reliance on Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978); Kaiser Aetna v. United States, 444 U.S. 164 (1979); and PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980). Citing these cases, Teleprompter asserts that:

> This Court has frequently held, contrary to appellant's argument,

> that every physical invasion does not invariably and inflexibly require compensation. (TPT* p. 9).

In fact, not only is there no such holding in any of these cases but Appellees must stretch considerably even to misinterpret dictum in these cases as supporting their position.

In Penn Central, the issue was whether New York City could prohibit a property owner from building on his own premises. There was no question of physical invasion by others and, therefore, there could be no holding sanctioning such an invasion.

Appellees make much of the statement in Penn Central that "A 'taking' may [Teleprompter's emphasis] more readily be found when the interference with property can be characterized as

---

*"TPT" refers to Teleprompter's Motion; "NYC" refers to the City's Motion.

a physical invasion by government, see, e.g., United States v. Causby, 328 U.S. 256 (1946)...." (438 U.S. at 124; see TPT p. 12, NYC p. 6). We would respectfully suggest, however, that if the use of the word "may" was truly intended by the Court as a "negative pregnant" -- i.e. to suggest that physical invasions "may" also not constitute per se takings -- that suggestion would necessarily have to refer to temporary incidental invasions (see JS pp. 39-40) and to such areas of arguable exception as invasions of air space (see United States v. Causby, supra), or emergency measures to prevent impending calamity (see Miller v. Schoene, 276 U.S. 272 (1928)).*

*The cited cases in fact do not necessarily represent exceptions to the per se physical occupation rule. However, detailed attention to this point can await full argument.

In Kaiser Aetna, the Court found that the governmental action permitting physical invasion was unconstitutional. Accordingly, it can hardly properly be asserted that the "holding" in that case supports Appellees' position here.

Appellees claim that the ratio decidendi of Kaiser Aetna was solely government interference with the marina owner's reasonable investment-backed expectations, not per se unconstitutionality of a continuing physical invasion and seizure of an easement. TPT pp. 18-20, NYC pp. 5 and 11. But this interpretation utterly ignores this Court's explicit statements in Kaiser Aetna that the "right to exclude" is "universally held to be a fundamental element of the property right,...[and] falls within [the] category of inter-

ests that the Government cannot take without compensation," and that the action must be condemned as involving "an actual physical invasion of the privately owned marina." 444 U.S. at 179-80; see JS pp. 29-30. Appellees' selective extraction from Kaiser Aetna of the phrase that government conduct there went "so far beyond ordinary regulation or improvement for navigation as to amount to a taking" fails to take into account the "physical invasion" language which we quote above. It also fails to take into account the unique legal and factual circumstances of the Kaiser Aetna case. Had the waters which were the subject of Kaiser Aetna been navigable prior to their improvement by Kaiser Aetna, the Court would presumably rather easily have concluded

that the Army Corps of Engineers had properly insisted on public access. The difficulty, however, was that Kaiser Aetna, through its own efforts and expenditure of considerable funds, had made what were purely private non-navigable waters into navigable waters. This Court's inquiry, therefore, necessarily focussed primarily on the novel question of the circumstances under which artificially created navigability would make waters susceptible to the navigational servitude. For this essentially definitional inquiry, the Court looked to the subjective factor of what reasonable investment-backed expectations had been engendered by the Corps of Engineers and whether such expectations had the status of a property interest under the unique circumstances. Once having determined, how-

ever, that Kaiser Aetna had a private property right not susceptible to the navigational servitude under common law, the Court applied the strictly objective per se standard to conclude that Kaiser Aetna was entitled to compensation for the imposition of an easement of public access.

No such difficulty is presented here. We are not dealing with any traditional public right of access to the "highways" of navigable waters, nor with definitional problems of what is "navigable", but rather with traditionally recognized private property upon which New York's imposition of an easement for Teleprompter's benefit both physically invades private property and expropriates for Teleprompter's benefit what cable companies and tenants previously had a legal obligation to pay

for. See JS p. 36n.

We have sufficiently distinguished PruneYard (JS pp. 33-36) to obviate the need for further discussion here. That case stands for nothing more than that, once an owner invites the whole world onto private property having the character of a public civic center, the state may constitutionally preclude the owner from prohibiting the exercise of free speech. The case does not hold that permanent physical occupation of private property which is open, at most, to particular invitees is constitutionally sustainable by avoidance of the traditional per se analysis.

(2)

Teleprompter asserts that Block v. Hirsh, 256 U.S. 135 (1921) supports its view that permanent physical occupation

under government authority does not necessarily constitute a taking. TPT pp. 22-23.

In Block, this Court, by Justice Holmes (in a 5-4 split), determined that a Washington D.C. rent law prohibiting evictions (provided the tenant paid rent at the existing level) was constitutional. The decision rested on (1) the existence of a war-generated public emergency, (2) the short duration of the statute (not more than two years), and (3) the concept that "the preference given to the tenant in possession... is traditional in English law" (256 U.S. at 157) and, therefore, by implication not violative of property rights.

Only a year after its issuance, Justice Holmes described the Block

decision as reaching "the verge of the law." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

The statute in question here goes beyond "the verge of the law" and its constitutionality is not governed by Block. Section 828 is not necessitated by any public emergency,* it is not temporary but permanent, and it is not sustainable by reference to any traditional common law right of others to make physical installations on private property.

(3)

While criticizing Appellant for seeking to continue application of a traditional analysis which Teleprompter

*Even the legislative findings recite merely that it would be "beneficial" for the State to nurture the cable television industry. Executive Law §811.

characterizes as "mechanistic," Teleprompter devotes considerable attention to inviting this Court, in lieu of the traditional analysis, to engage in the rather metaphysical exercise of determining whether Executive Law §828 is an act in the course of government's "arbitral" or "entrepreneurial" capacities. TPT pp. 13-15. The futility of this effort to determine what sort of angels are dancing on which pin is easily illustrated by the hypothesis that Teleprompter were a government-owned enterprise.* Surely in such a case, Teleprompter would have to concede that its seizure of an "easement" over private property is an "entrepreneurial" act characteristic of a

*In fact, local governments are beginning to engage directly in the cable television business. "Cities Fight to Keep Grip on Cable TV," New York Times, 9/1/81, p. A14, col. 1.

"taking" No adequate explanation can be advanced why the result should be different if government authorizes a private company to seize exactly the same "easement."

Such analytical difficulties have in fact compelled the author of the "arbitral/enterprise" distinction himself to abandon that test on the ground that he "now view[s] the problem as considerably more complex" than he had in the earlier work cited by Teleprompter. Sax "Takings, Private Property and Public Rights," 81 Yale L.J. 149, 149-51 (1971). We further observe that, although this Court may fleetingly have adverted to the "arbitral/enterprise" test in Penn Central (438 U.S. at 128), it has, to our knowledge,

given that theory no further attention.*

(4)

The series of cases cited by Teleprompter in the note on page 24 of its motion also fails to support its cause. Each concerns clear-cut police power regulations requiring landlords to comply with various building code requirements. Two factors negative Teleprompter's suggestion that if the legislature can validly require a landlord to expend significant funds itself, "then a fortiori, the modest use of appellant's property contemplated by Section 828, utilizing facilities paid for by Teleprompter, is also constitutional."

*This Court has implicitly recognized the uselessness of the analogous "governmental/proprietary" distinction in governmental tort immunity cases in Owen v. City of Independence, 445 U.S. 622, 644-650 (1980).

First, the cases cited all involve improvements deemed by the legislature or executive to be essential for the health and safety of the public and tenants -- a far cry from the benefits from improved television reception and program availability sought here. Second, even if the legislature could require landlords to provide certain facilities on their own property to benefit tenants, that is not what the legislature purports to have done here. Rather, the legislature authorized placement by Teleprompter of Teleprompter's own equipment, thus authorizing an unconstitutional physical occupation. Such distinctions may not be taken lightly as is shown by a comparison of United States v. Pewee Coal Co., 341 U.S. 114 (1951) with United States v. Central

Eureka Mining Co., 357 U.S. 155 (1958). In the latter case, a wartime prohibition against mining was deemed constitutional as a regulation of economic activity. In the former, however, the mere act of the government in "planting its flag" on mines, despite continued exploitation of the mines for the benefit of the private owners in the government's name, was deemed an unconstitutional taking.

(5)

Teleprompter has, with some frequency, suggested that Appellant has really lost nothing because she does not truly desire the removal of Teleprompter's equipment anyway. TPT pp. 9, 15, 23, 26-27. This innuendo elevates rather strained interpretations of Appellant's highly ambiguous

deposition statements over the hard fact that for the last five and a half years Appellant has pursued this litigation from the Supreme Court of New York County to the Supreme Court of the United States in order to enjoin Teleprompter's conduct.*

(6)

Teleprompter seeks to belittle the significance of this case by asserting that Appellant could, at best, recover only nominal damages. TPT pp. 8, 20n. The proper measure is, in fact, rental value as established by Teleprompter's own almost universal prior practice --

*Teleprompter's innuendo that Appellant may lack standing because her predecessor in title licensed Teleprompter ignores that the Court of Appeals expressly found, as a matter of New York law, that Appellant is not bound by the prior license. (A15-18).

i.e. 5% of gross revenues. 87 C.J.S. Trespass §119. Even were this not the case, however, we are not acquainted with any rule that an expropriation ceases to be such if the property taken is worth little.*

(7)

Teleprompter's conclusion (pp. 27-29) utterly misses Appellant's point that the replacement of the traditional per se standard will disrupt juridical certainty and impose a "chilling effect" on the willingness and ability of property owners effectively to combat takings.

---

*The Attorney General's Brief (p. 5) similarly seeks to imply a factual basis for minimal damages. In fact none of the "facts" recited in the third paragraph on page 5 of his Brief constitute findings in this case, the easement appraisal referred to is from an entirely unconnected case and was not made on the subject property, and the "facts" are inconsistent with the evidence.

Teleprompter's effort to "distinguish" the examples cited by Appellant at pp. 42-45 of the Jurisdictional Statement as not involving legislation purporting to have been adopted under the "police power" rubric fails to comprehend the impact of the Court of Appeals' decision in this case. Of course legislatures in the past may not have been so imaginative nor so audacious as to characterize traditional seizures of property as exercises of the "police power." But the danger generated by the Court of Appeals' decision in this case is that legislatures are in effect told that all they need do in the future to salvage legislation otherwise clearly constituting an unconstitutional taking is to recite a few preambulatory statements about

public welfare and then label the act a "regulation." Instantly, the Court of Appeals' decision in Loretto v. Teleprompter applies and the centuries-old certainty of the per se rule is no longer available.

We submit that the danger of this result warrants this Court's attention in the instant appeal.

Dated: New York, New York
October 2, 1981

Respectfully submitted,

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Amicus Brief

1

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No. 81-244

IN THE

Supreme Court of the United States

October Term, 1981

JEAN LORETTO, on behalf of herself and all others similarly situated,

Appellant,

against

TELEPROMPTER MANHATTAN CATV CORP., TELEPROMPTER CORPORATION and CITY OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

Brief Amicus Curiae of Attorney General of the State of New York in Support of Appellees' Motion to Dismiss

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Question Presented.

May the Legislature in the exercise of its police power in furtherance of the development of cable television as a communication and educational medium, regulate the rights of landlords and tenants so as to prohibit a landlord from interfering with the installation of cable television facilities upon his premises?

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No. 81-244

IN THE

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OCTOBER TERM, 1981.

JEAN LORETTO, on behalf of herself and all others similarly situated,

Appellant,

against

TELEPROMPTER MANHATTAN CATV CORP., TELEPROMPTER CORPORATION and CITY OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

Brief *Amicus Curiae* of Attorney General of the State of New York in Support of Appellees' Motion to Dismiss.

Interest of *Amicus Curiae*.

The Attorney General submits this *amicus curiae* brief pursuant to Rule 36(4) of the Rules of this Court in support of the constitutionality of section 828 of the New

York State Executive Law, challenged by appellant on this appeal. The Attorney General had heretofore, pursuant to New York Executive Law, § 71 submitted a brief below to the Court of Appeals of the State of New York in support of the Constitutionality of section 828 of the Executive Law (JS, i-ii).

Summary of Argument.

The Legislature of the State of New York determined that cable television operations involved vital business and communication services and that the State would benefit from valuable educational and public services through cable television systems. Landlords by exacting enormous fees and imposing onerous conditions on cable television companies for installing cable television equipment on the landlords' premises, were depriving tenants of access to cable television and preventing the development of the cable television industry and prohibiting the delivery of adequate, economical and efficient service to subscribers.

Landlords were in effect insisting that some negligible unoccupied space remain unoccupied.

Application of the factors enumerated by this Court in *PruneYard Shopping Center v. Robins,* 447 US 74 (1980), demonstrates that invasion of the premises is minimal; the value of the invasion or "easement" is nominal and the landlord has no use for the area occupied by the equipment. The equipment placed on the premises by the cable television companies, rather than destroy or impair value, actually increases the value of the premises.

There is no showing of any investment made in the expectation that fees would be derived from the cable television installations separate and apart from the basic rent paid by the tenant.

Section 828 is a valid police power exercise and is not a taking.

The Nature of the Case.

On January 24, 1968, the defendant Teleprompter (hereinafter both defendant corporations will be collectively referred to as "Teleprompter") obtained by written instrument an easement from Shaire Wald granting Teleprompter the right to install television coaxial cable and equipment upon four brownstone buildings owned by Mrs. Wald located at 31 West 84th Street, 58 West 87th Street, 310 West 90th Street and 303 West 105th Street (JS, A13). The agreement provided that it would be in effect for a period of five years and thereafter from year to year and that after the initial five-year period, either party could terminate it upon written notice given not later than 90 days prior to the end of any contract year (JS, A13). The agreement further provided that it was to be binding on the parties, their successors and assigns, and that if the landlord transferred the premises, it shall notify the purchaser or transferee of the agreement and the transferee shall have the right, at any time within six months after the transfer, to terminate the agreement upon 90 days' written notice to Teleprompter (JS, A13-A14). Teleprompter paid Shaire Wald for installation of the equipment the sum of $50 for each building (JS, A13).

On June 1, 1970, Teleprompter installed its equipment on the roof of the building located at 303 West 105th Street, necessary to provide service to the tenants therein (JS, A14). The equipment installed consisted of coaxial cable slightly less than ½" in diameter and approximately 30 feet in length and directional taps which are "silver boxes" approximately 4" by 4" by 4" (JS, A14). Such equipment is visible and discoverable by mere observation. On June 8, 1970, Teleprompter extended the coaxial cable

from the directional tap boxes located on the building to the adjoining building at 305 West 105th Street by installing a new cable approximately four to six feet in length (JS, A14).

Nine months later in March, 1971, the plaintiff, a licensed real estate broker, with substantial experience in the purchase of brownstone and similar apartment buildings and in the selling of cooperative apartments, purchased 303 West 105th Street from Shaire Wald (JS, A14). The plaintiff has lived in the building since the day of purchase. The plaintiff visited the roof of the building before purchase for the purpose of inspecting for leaks, bubbles in the tar, leakage around retaining walls, chimneys and the bulkhead (JS, A15). The plaintiff alleges that when she inspected the roof before purchase of the building, she did not see the coaxial cables or the directional tap boxes (JS, A15). The plaintiff alleges that she first became aware of the coaxial cable and directional tap boxes in 1972. The plaintiff did not at that time request Teleprompter to remove the cable and the directional tap boxes (JS, A16). The plaintiff's deposition in this action was taken on September 14, 1977. At said deposition, the plaintiff testified that she has *never* requested Teleprompter to remove their equipment from her building "because I didn't want to upset the tenants."

On February 3, 1976, which date is five years after the plaintiff purchased the building (and inspected the roof) and four years after the plaintiff first observed Teleprompter equipment, the plaintiff commenced this present action for trespass (JS, A2).

ARGUMENT.

The Legislature of the State of New York in the exercise of its police power validly enacted Executive Law, § 828 which regulates the use of private property by prohibiting a landlord from interfering with the installation of cable television facilities upon his premises.

Application of the three factors enunciated by this Court in *PruneYard Shopping Center v. Robins, supra,* to the facts in this case demonstrates that there has been no "taking" of appellant's property "in the constitutional sense" (*Armstrong v. United States,* 364 US 40, 48 [1960]). The *PruneYard* factors are "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations" (*supra,* p 83).

The statute permits the appellees to place their cable television equipment on the appellant's premises. The appellant had no use for the space occupied by the equipment (A1).* The "negligible unoccupied space [would] remain unoccupied" (4a). The equipment rather than destroy or impair the value of the premises enhances its value (5a-7a). Actual appraisal of the "easement" concluded that the value is nominal and that severance damage on the balance of the property was non-existent (8a-10a).

The Court of Appeals thus concluded (JS, A55-A57):

> "* * * the case law establishes that degree of loss remains a factor which will invalidate a regulation when all but a bare residue of value is lost as a

*Matter attached as an Appendix hereto is from appellant's Appendix submitted to the New York State Court of Appeals.

result of the regulation (*French Investing Co. v. City of New York,* 39 NY2d 587, 596, *supra; Lutheran Church v. City of New York,* 35 NY2d 121, 132) but not when the regulation does not 'unreasonably impair the value or use' of the property (*PruneYard Shopping Center v. Robbins,* 447 US at p 83, *surpa;* see also *Agins v. City of Tiburon,* 447 US 255) or does not interfere with the 'privacy expectation concerning the use of' the property (*Penn Central Transp. Co. v. New York City,)* 483 US at p 136 *supra*); property available to its owner even though without the regulation the value of the property would have been many times greater (*Penn Central Transp. Co. v. City of New York,* 42 NY2d 324, *Modjeska Sign v. Berle,* 43 NY2d 468, app dismd 439 US 809) or when 'the resulting loss to the owner is relatively slight and insubstantial' (*People v. Miller,* 304 NY 105, 108; see *Kaiser Aetna v. United States,* 444 US 164, 180) or 'comparatively insignificant' (*Noble State Bank v. Haskell,* 219 US 104, 110).

"Here plaintiff Loretto makes no claim that she is not receiving a fair return from the property."

The Court of Appeals also concluded (JS, A62-A63):

"Here, as in *PruneYard*, there is no showing of any investment made in the expectation that fees would be derived from CATV installations separate and apart from the rent normally paid by the tenant. Such income as plaintiff and other property owners derived from CATV installations prior to enactment of Section 828 arose not from any investment-backed expectation but from the combination of the owner's common law right of exclusion and the desire of tenants generally to avail themselves of CATV service, which infused value

> into what had previously been, as Commissioner Jones characterized it, 'negligible unoccupied space.'
>
> "Tested against the Supreme Court's factual inquiry criteria, Section 828 is a valid police power exercise and not a taking."

Cable television was more than twenty years old at the time of the adoption by the New York State Legislature of Article 28 of which section 828 is a part (JS, A41). The development of the industry had been severely restricted by gouging and arbitrary action by landlords who were imposing onerous conditions and fees before permitting cable access to their buildings (JS, A41). Joseph C. Swidler, Chairman of the New York State Public Service Commission, testified before the Joint Legislative Committee considering the cable television bill and stated as follows:

> " 'As you may know, landlords in many instances have imposed extremely onerous fees and conditions *on cable access to their buildings.* Clearly, landlords should be allowed to impose conditions governing the safety and appearance of their property and to bear the full cost of installtion and indemnification for damage. *Legislation is necessary, however, to prohibit* gouging and *arbitrary action.*" (Emphasis supplied, JS, A33.)

William K. Jones, a Commissioner of the Public Service Commission, in his report to the Governor entitled "Regulation of Cable Television by the State of New York (1970)", in proposing the enactment of Article 28, stated that its purpose was to assure that tenants have access to cable television service on the same footing as do individual homeowners. His report stated, in part, as follows (pp 206-207):

> "[This] proposal involves some intrusion upon the property interest of the landlord. But the interest intruded upon is a wholly abstract one—given the conditions specified, the landlord's interest *consists entirely of insisting that some negligible unoccupied space remain unoccupied.* The tenant's interest clearly is more substantial, consisting of a right to receive (and perhaps send) communications from and to the outside world. In the electronic age, the landlord should not be able to preclude a tenant from obtaining CATV service (or to exact a surcharge for allowing the service) any more than he could preclude a tenant from receiving mail or telegrams directed to him." (Emphasis supplied; JS, A32, A33.)

Section 811 of Article 28 contairs the declaration of legislative findings and intent and recites that

> " 'after investigation of the public interest associated with cable television' the Legislature has determined that CATV operations involve 'vital business and communication services' which 'must be protected from undue restraint and regulation so as to assure cable systems with optimum technology and maximum penetration * * * as rapidly as economically and technically feasible,' that 'the State would benefit from valuable educational and public services through cable television systems,' that a state agency is needed, therefore, 'to promote the rapid development of the cable television industry' and 'assure that cable television companies provide adequate, economical and efficient service to their subscribers'." (JS, A28, A29).

Executive Law, § 828, was enacted in 1972 as part of Article 28, effective January 1, 1973 (McKinney's Session

Laws, 1972, chs 466, 467). Not only does section 828 relate to the purpose for which it was enacted, it was a necessary ingredient to achieve the stated objective that the benefits from cable television be extended to as large a segment of the public and business community as possible. That the section was necessary is amply demonstrated by the Jones report and the testimony of Chairman Swidler.

Section 828 is a clear example of the valid exercise of the police power of the State to regulate in the public interest the use of private property.

As this Court has previously held in *Euclid v. Ambler Co.*, 272 US 365, 386-387 (1926):

> "Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for, while the meaning of consitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming

within the field of their operation. In a changing world it is impossible that it should be otherwise."

The Legislature of the State of New York has decided that the "furtherance of the development of CATV as a communications and educational medium" (JS, A72) "is of greater value to the public" (*Miller v. Schoene*, 276 US 272, 279 [1928]) than the minimal nature of the invasion of the appellant's property.

The statute meets every constitutional test as set forth by this Court in *PruneYard*.

CONCLUSION.

The appeal should be dismissed.

Dated: Albany, New York
August 26, 1981

Respectfully submitted,

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Appendix

Appendix.

cost of repair? A. No. It's a landmark building and—not everybody can repair it.

Q. Aside from the question of the injury to the building, how would the space on the roof and on the side of the building be used if there were no cables, silver box and staples on the building? A. It would still remain a facade of a house.

Q. What I am trying to get at is, you wouldn't be using this space in any other way. The house would just be standing there, isn't that right? A. That's correct.

Q. The place where the silver box is on the roof of the building would be empty, is that right? A. True.

Q. The place on the roof of the building where the cable runs would also be empty, is that correct? A. True.

Q. The place on the front or back of the building, wherever the cable happens to be, the drop cable, that would also be empty, is that right? A. That's right.

Q. Do you personally negotiate the leases with the tenants in 303 West 105th Street?

within the landlord's property or premises, 'in excess of any amount which the Commission shall, by regulation, determine to be reasonable.' These provisions, which have been in effect since January 1, 1973 (the effective date of Article 28 of the Executive Law), clearly entitle cable television companies to install and operate their facilities upon rental properties and premises without landlord interference and, *in view of the absence of any Commission regulation prescribing a reasonable fee, without payment of any amount to the landlord of any such property or premises.*" (emphasis supplied)

The legislative intent in enacting Section 828 is clear and unequivocal. The Legislature intended that landlords receive no revenue from the routine wiring of a building for the purpose of providing service to persons who request such service and who reside in such buildings, or for wiring to pass through to adjoining property in order to service adjoining property. This is confirmed by a review of the legislative history resulting in Section 828. The origin of this section is derived from a Report to the Public Service Commission (PSC) by Commissioner William K. Jones in December 1970, entitled *Regulation of Cable Television by the State of New York*. In that report Commissioner Jones recommended that, "Landlords would be prohibited from interfering with the access of tenants to CATV."[2] Commissioner Jones prepared the report pursuant to the request of Governor Rockefeller that the PSC investigate the operation of CATV systems in New York. His conclusions regarding the

[2]Page four of letter to Governor Rockefeller dated December 31, 1970, from Chairman Swidler of the Public Service Commission forwarding Commissioner Jones' Report.

difficulties of cable subscribers receiving CATV service were as follows:

> "State legislation should make clear that landlords have no standing to impede the delivery of CATV services to their tenants. Landlords may insist that the CATV operator (or tenant) bear the entire cost of the installation; that the installation conform to such reasonable requirements as the landlord may impose to protect the safety, operation or appearance of his building; and that the CATV operator (or tenant) agree to indemnify the landlord for any damage incurred by the installation. Beyond this, the landlord has no legitimate interest. The tenant, on the other hand, has as much interest in receiving CATV service as he has in receiving mail, telephone communications, or over-the-air television signals. And landlord impediment to the extension of CATV service is disadvantageous not only to the personal interests of tenants, but to the development of the CATV industry. Accordingly, *it is recommended that legislation be enacted to prohibit landlords from:*
>
> (1) Interfering with CATV installations desired by a tenant, as long as the above conditions of cost, landlord specifications, and indemnifications are met.
>
> (2) *Accepting payment, either from CATV operators or from tenants, in exchange for permitting CATV service in his building.*

(3) Discriminating in rental charges between tenants receiving CATV service and those not receiving CATV service.

The effect of the last requirement, *inter alia*, would be to eliminate the $2 monthly surcharge permitted by New York City rent control administration. *To supplement these restrictions, CATV operators should be prohibited from making payments to landlords to obtain access to their buildings and from discriminating in charges between tenants and home-owners otherwise similarly situated.*

This proposal involves some intrusion upon the property interest of the landlord. But the interest intruded upon is a wholly abstract one—given the conditions specified, the landlord's interest consists entirely of insisting that some negligible unoccupied space remain unoccupied. The tenant's interest clearly is more substantial, consisting of a right to receive (and perhaps send) communications from and to the outside world. In the electronic age, the landlord should not be able to preclude a tenant from obtaining CATV service (or to exact a surcharge for allowing the service) any more than he could preclude a tenant from receiving mail or telegrams directed to him." (emphasis supplied) (Pages 206-207)

Mr. Lesch: I am asking her now a different question that relates to monetary value. What you could sell the building for.

Q. Is it your belief, Mrs. Loretto, that the presence of those components, CATV components on your building means that if you wanted to sell your building tomorrow, you would get less for it than you would if there were no CATV components on the building? A. Shall we say I think I could get more if they weren't there?

Q. You think so? A. Yes, the whole block would.

Q. I am not talking about the whole block. I am just talking about your building.

Are you aware of the fact that certain owners of buildings have stated that they believe the values of their building are increased by the presence of CATV availability in the building?

Mr. Gruen: I object to the question. I think it is argumentative.

She answered the question as to her belief concerning the value of her building as affected by CATV components. I don't see how her knowledge as to the opinion of others is at all

relevant.

Mr. Lesch: Are you directing her not to answer?

Mr. Gruen: Answer the question as best you can.

A. In my experience large apartment house owners find it an advantage, for those tenants on a court, et cetera, who really couldn't get reception without it.

Q. Is your experience that only large apartment house owners find it to be an advantage in terms of increasing the value of their buildings?

Mr. Gruen: She hasn't said that she thinks it increases the value of their building. She said that the owners consider it an advantage to have CATV.

Mr. Lesch: That was my question.

Did you understand my question, Mrs. Loretto?

The Witness: Sort of, yes.

Q. When I was talking about the presence of cable components and the fact that that meant that tenants of a building could receive CATV signals whereas otherwise they couldn't, my question was whether you were

aware that owners of some apartment buildings thought that that increased the value of their buildings? A. Yes, I agree with that.

Q. I believe that you said that owners of large apartment buildings where tenants faced the courts and couldn't get reception— A. True, where they had no reception. Large co-ops—

Q. —would consider it an advantage to have cable television. Would they also agree that that increased the value of their building, as far as you know? A. Yes.

Q. Other than the owners of large apartment buildings, are you aware of any other owners who believe that the ability of their tenants to receive CATV signals increases the value of their buildings? A. Not in smaller buildings.

Mr. Gruen: I want to register the same objection to the question, and Mrs. Loretto has answered, I assume, to the best of her ability.

Q. Has any offerer, to your knowledge, in the sense that we used that expression before, someone who wanted to purchase your building, told you that they would

has never been any sympathy for legitimizing the proposition that landlords should be paid for routine wiring. The chapter amendment which added the language which authorizes the Commission to provide for certain payments to landlords merely provides the mechanism for landlords to be reimbursed when major facilities are being placed on their property. There is absolutely nothing in the legislative history of Section 828 to support the view that landlords have any property right to be protected in connection with the routine wiring of dwelling units. To interpret the chapter amendment to permit landlords to be paid for routine wiring would fly in the face of Commissioner Jones' Report, Chairman Swidler's letter to Governor Rockefeller fowarding the Report, Chairman Swidler's testimony before the Senate-Assembly Panel, and the memoranda accompanying the Governor's Program Bills for 1971 and 1972.

Accordingly, the Commission should adopt the attached proposed rules which implement the Legislative intent in enacting Section 828 of the Executive Law.

In dealing with landlords, both Sterling and TelePrompter have observed that many landlords do not object to the installation of CATV facilities on their property. In many instances, landlords welcome these facilities without demand for payment for they realize that CATV facilities will actually enhance the value of their property by providing the tenant with good TV reception, additional programming and many ancillary services that CATV systems offer. Indeed, a review of advertisements in recent issues of

The various legislative proposals culminating in Article 28 of the Executive Law included provisions implementing Commissioner Jones' recommendation on this issue; Article 28 of the Executive Law as eventually enacted included such a provision but that provision was tempered by the amendment establishing the reasonable fee jurisdiction of this Commission.*

In view of the policy emboied in Section 828 of the Executive Law, it appears that the likely purpose of the reasonable fee provision thereof was to assure that Section 828 did not subject landlords to potentially unconstitutional takings of their property without just compensation. Cable television companies in New York State are incorporated pursuant to the Transportation Corporations Law and may well have powers of condemnation pursuant to Section 27 of that law. In the absence of legislative history demonstrating any intent to award greater fees to landlords, we shall construe the reasonable fee provision of Section 828 of the Executive Law to assure that a landlord is not deprived, by reason of a cable television company's assertion of its Section 828 rights, of the right to compensation with which the condemnation procedure of the Transportation Corporations Law would provide him.

In view of the foregoing, we have determined that Section 828(a)(b) of the Executive Law should be read to prohibit the payment of a fee, in exchange for access by a cable television company to the premises, in excess of the award to which a landlord would be entitled in the event the cable television company were to proceed in accordance with the Condemnation Law. A condemnation-type appraisalwas submitted to us in connection with the case we decided today,** and it expresses the opinion that the easement used by the cable television company to provide

cable service to the premises in question is nominal in value.*** White the case decided today involves a small, five-apartment building, Manhattan Cable Television, Inc. has also submitted an appraisal of the easement it uses to supply service to a 200-unit building and that appraisal, as well,

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* L.1972, c.467, § 7. Other states have enacted similar statutes without reasonable fee provisions. *Cf. e.g.*, Conn. Public Act 75-301 (1975); Mass. Gen'l. Laws, c.166A, § 22 (1975).

** *Application of Irving Kissin, supra.*

***The appraisal was prepared by James D. Landauer Associates, Inc. It concludes that the value of the 20.938 square foot easement taken was nominal, and that severance damages, on balance, were non-existent.

concludes that the value of the subject easement is nominal.* We are satisfied that, in the circumstances described by the appraisals submitted to us, the value of the easement used to provide cable service is nominal.** We also believe these circumstances to be typical and, therefore, we have determined that in the absence of a special showing of greater damages attributable to the taking, the only fee that is reasonable under Section 828(1)(b) of the Executive Law is a nominal one.

It is important for us to note the limitations of today's determination, which is intended to address only the situation in which a cable television company enters a building for the purpose of providing cable television service to the residents of that building. Today's holding does not, therefore, apply to a situation in which a cable television company seeks to cross particular property for the purpose of serving adjoining property. It does not apply to situations in which equipment is installed in a particular

building to serve subscribers residing in neighboring buildings. It does not limit a landlord's rights under clauses i, ii and iii of subdivision (1)(a) of Section 828 of the Executive Law.*** Finally, it does not apply to voluntary agreements pursuant to which the landlord is to supply significant services or cooperation to the cable television company as well as access to the premises.

In view of the importance of today's determination, we shall extend the usual 20-day period for the filing of petitions for reconsideration**** and shall permit all interested parties to

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*This appraisal was also prepared by James D. Landauer Associates, Inc. It concludes that the value of the 304.66 square foot easement taken was nominal and that severance damages, on balance, were non-existent.

**In this regard, we stress that we believe that our charge pursuant to Article 28 of the Executive Law is to fix the lowest possible fee that would assure the constitutionality of Section 828.

***Section 828(1)(a) of the Executive Law provides as follows: "No landlord shall interfere with the installation of cable television facilities upon his property or premises, except that a landlord may require (i) that the installation of cable television facilities conform to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises, and the convenience and well-being of other tenants; (ii) that the cable television company or the tenant or a combination thereof bear the entire cost of the installation, operation or removal of such facilities; and (iii) that the cable television company and the tenant agree to indemnify the landlord for any damage caused by the installation, operation or removal of such facilities."

****Section 590.19(a) of our Rules.

Appellant's Brief

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No. 81-244

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JEAN LORETTO, on behalf of herself and all others similarly situated,

Appellant,

v.

TELEPROMPTER MANHATTAN CATV CORP., TELEPROMPTER CORPORATION and CITY OF NEW YORK

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

APPELLANT'S BRIEF

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December 11, 1981

APPEAL DOCKETED AUGUST 4, 1981
PROBABLE JURISDICTION NOTED OCTOBER 19, 1981

QUESTION PRESENTED

Is a state statute which authorizes private cable television companies to install cables and other equipment on the property of others without compensation, and which prohibits property owners from interfering with such installations, invalid as a taking or as a deprivation of property without due process under the Fifth and Fourteenth Amendments to the United States Constitution?

PARTIES

In addition to the parties named in the caption, the Attorney General of New York State intervened at the New York Court of Appeals level to support the constitutionality of the challenged statute, as he is required to do by New York Executive Law § 71.

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REPORTED DECISIONS BELOW

The New York Court of Appeals' decision on the merits, from which this appeal is taken, is published at 53 N.Y.2d 124, 440 N.Y.S.2d 843. The Court of Appeals denied (without opinion) a motion to dismiss the appeal for want of a substantial constitutional question at 51 N.Y.2d 1007.

The decision of the New York County Supreme Court is reported at 98 Misc. 2d 944, 415 N.Y.S.2d 180. The affirmance without opinion of the Appellate Division, First Department, is reported at 73 A.D.2d 849.

JURISDICTION

This is a class action on behalf of affected New York State property owners seeking damages and injunctive relief with respect to trespasses consisting of the installation and maintenance on

private property of coaxial cables and other equipment for the transmission of television signals. (JtA5).* The constitutionality of a State statute permitting such conduct (New York Executive Law § 828(1)) is challenged in the complaint (JtA18-19) and is raised as an affirmative defense (JtA29-30).

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(2) because the validity of a State statute has been challenged as repugnant to the Fifth and Fourteenth Amendments to the United States Constitution and has been found to be valid by the highest court of the State.

Notice of Appeal to this Court from the Court of Appeals' decision and order entered May 7, 1981 was filed in the New

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* "JtA" refers to the Joint Appendix. "JSA" refers to the Appendix to the Jurisdictional Statement.

York County Supreme Court on July 22, 1981. Probable jurisdiction was noted October 19, 1981.

CONSTITUTIONAL AND STATUTORY PROVISIONS

N.Y. Executive Law § 828

The statute challenged as unconstitutional is New York's Executive Law § 828(1) (referred to herein as "Section 828") which, as amended to date,* provides:

> § 828. Landlord-tenant relationship
>
> 1. No landlord shall
>
> a. interfere with the installation of cable television facilities upon his property or premises, except that a landlord may require:
>
> i. that the installation of cable television facilities conform

---

* L. 1972, c. 466; L. 1972, c. 467 added the language underlined in the text of the statute and became effective simultaneously with the original statute; L. 1979, c. 479 § 1 deleted the language bracketed in the text.

to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises, and the convenience and well-being of other tenants;

ii. that the cable television company or the tenant or a combination thereof bear the entire cost of the installation, operation or removal of such facilities; and

iii. that the cable television company [and tenant] agree to indemnify the landlord for any damage caused by the installation, operation or removal of such facilities.

b. demand or accept payment from any tenant, in any form, in exchange for permitting cable television service on or within his property or premises, or from any cable television company in exchange therefor in excess of any amount which the commission shall, by regulation, determine to be reasonable; or

c. discriminate in rental charges, or otherwise, between tenants who receive cable television service and those who do not.*

---

* Similar statutes exist in Connecticut (Conn. Stats. Ann. § 16-333([a]), Massachusetts (Mass. Gen. Laws. Ann. Ch. 166A § 22, Ch. 166, § 35), and New Jersey (N.J. Stats. Ann. § 48:5A-49).

Fifth and Fourteenth Amendments

Appellant asserts that Section 828 violates the Fifth Amendment:*

> nor shall property be taken for public use without just compensation

and the Fourteenth Amendment of the United States Constitution:

> nor shall any state deprive any person of . . . property, without due process of law.

STATEMENT OF THE CASE

Facts

Plaintiff-Appellant, at the commencement of this action, owned a brownstone-type apartment house in Manhattan. (JtA11, 151). In either 1970 (JtA157ff) or 1972 (JtA11, 89-91), Defendant Teleprompter Manhattan CATV Corp.** in-

* The Fourteenth Amendment incorporates the taking clause of the Fifth Amendment. PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980).

** The Complaint asserts that Teleprompter Corporation is responsible for the acts of

(Footnote continued on next page)

stalled on her roof two cables, each approximately 1/2 inch in diameter (JtA 160), extending across the width of the front and back of her roof from the adjacent house on one side to the adjacent house on the other side (JtA90, 160-61; Loretto Aff. 4/21/78). Along the route of each cable on her roof, Teleprompter installed directional taps (signal-splitting mechanisms), each approximately 4" x 4" x 4". (JtA158-61). Thereafter, Teleprompter installed two large silver boxes* along the roof cables (JtA9091, 93) and dropped a tenant-service line to the first floor so that it hung loosely down the front of Mrs. Loretto's

(Footnote continued from preceding page)
Teleprompter Manhattan CATV Corp. and is directly liable for activities outside New York City (JtA15-17). For convenience, the two companies are referred to herein collectively as "Teleprompter."

* Although the record indicates only that they are "big" or "large" (JtA90; Loretto Aff. 4/21/78), the size is approximately 18" x 12" x 6".

building (JtA12, 83). The installation was by Teleprompter's standard methods: the roof cables are attached by screws or nails penetrating the masonry at approximately two foot intervals, and other equipment is installed by bolts. The screws and bolts range from 1" to 2 1/2" in length. (JtA13-14, 133-36, 139-40).

The function and route of the cable are also typical of Teleprompter's installations: Initially, the roof cables provided no service to Appellant's building; rather Teleprompter merely utilized her building as part of a highway for circumnavigating the entire city block and dropping service cables over the front or back of any building along the way in which a tenant desired service. (JtA11, 90, 142-43, 159-62; see Teleprompter's installation diagrams, JtA166-71). Thus, what electric, gas and water

utilities do by installing feeder lines under or along public streets, with service lines coming into each property from the street, Teleprompter does by utilizing the roofs of privately owned buildings as if they were a public highway.*

Prior to the adoption of Section 828, Teleprompter obtained authorizations for its installations from the property owners along the cable's route, compensating the owners for that authorization. Where tenant service was provided, compensation was almost invariably five percent of the gross revenues realized from the particular property. That rate was set by management policy and was incorporated into a standard printed form of contract which Teleprompter's offered to

---

* Such installations, which utilize space on one property to service subscribers on another property, are referred to as "cross-overs."

landlords* when seeking consent for installations. (JtA138, 143-44, 163-65; Gruen Aff. 4/28/78 at 6-8 and Exh. O).

Teleprompter has often circumvented the buildings of non-consenting owners by reaching the building to be serviced from the street or from a different neighbor. (JtA147-50, 166-71; Gruen Aff. 4/28/78 at 4-5).

Effective January 1, 1973, New York adopted Section 828 prohibiting landlords from interfering with the installation of cable television equipment on their property and limiting compensation to such amount as may be approved by the newly created State Commission on Cable Television (the "Commission"). Three years later, the Commission adopted a "Statement of General Policy" limiting compen-

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* We use the term "landlord" throughout in the sense of the owner of rental property. We use the term "owner" to refer to owners of all types of real property.

sation under normal circumstances to a one-time fee of $1.00. (JtA44; JSA7, 122). The Commission expressly sought to keep compensation to the lowest possible level. (JtA52n). It applied a valuation method based upon the number of square feet utilized by the cable; market value of the easement (as evidenced by what the cable company formerly paid) was evidently not taken into account. (JtA51-52).

Upon the effective date of Section 828, Teleprompter ceased compensating property owners and relying upon their consents. (JtA77; Exhs. L and O to Gruen Aff. 4/28/78).

Procedural History

The New York County Supreme Court has determined that Mrs. Loretto represents a class of owners of real property in the State of New York affected by

Teleprompter's installations. (JSA138, 130).

The City of New York--which itself licenses Teleprompter to utilize public streets for installing cables and other equipment for a fee of five percent of Teleprompter's gross revenues (JtA155; B. Simon Aff. 2/17/78, Exh. E; Gruen Aff. 4/28/78, Exh. Q)--intervened on Teleprompter's side.

On motions for summary judgment by all parties, the New York County Supreme Court sustained the constitutionality of Section 828 as a valid exercise of the police power. (JSA121). The Appellate Division affirmed without opinion. The Court of Appeals affirmed on essentially the same ground, but interpreted the statute (a) as covering only buildings having rental tenants; (b) as not requiring but merely permitting compensation for

non-crossover installations* at such level (not necessarily the "just" level prescribed by the Fifth Amendment) as the Commission may allow; and (c) as not permitting compensation at all for crossover installations. (JSA1ff, 22-24, 27-28, 35-37, 70n, 71). The Court of Appeals eliminated all non-constitutional issues.** (JSA13-37).

The Court of Appeals recognized that installations on Appellant's property are not authorized by Appellant (JSA15-18) and would be trespassory but for Section 828 (see JSA69).

Chief Judge Cooke dissented, stating

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* Non-crossovers service only the property on which they are located.

** These included, among others, a claim that plaintiff was bound by an unrecorded consent given by her predecessor in title, and exhaustion of administrative remedies.

that Section 828 constitutes a per se taking because it authorizes a physical appropriation of a portion of the owner's property. (JSA76ff). Judge Gabrielli concurred in this view but voted with the majority because he viewed the statute as providing for a means of obtaining just compensation.* (JSA73ff).

SUMMARY OF ARGUMENT

The New York Court of Appeals' decision in this case upsets a basic tenet of taking jurisprudence: that a continuing physical occupation of real property authorized by the State constitutes a per se taking requiring compensation. Instead, the Court of Appeals has erroneously applied a balancing test--erroneously both because it was applied at all

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* As noted at pages 11 to 12, supra, the majority interpreted the statute as not requiring any compensation, thereby eliminating the issue on which Judge Gabrielli's concurrence turned.

(Point I) and because such test was applied incorrectly (Point II).

First, the error in choosing a balancing test results from a misreading of the recent history of taking jurisprudence. Prior to 1922, this Court essentially recognized only seizures of title and physical expropriations as takings. Then, in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), the Court expanded the concept of takings to encompass regulations which--upon a balancing test--unduly restrict the enjoyment of private property. This development, which was intended to expand the right of property owners to receive compensation, was used by the Court of Appeals in this case to deny compensation which previously would have been awarded on a per se basis. (Point IA).

State-sanctioned installations of communications transmission lines (in-

cluding lines for such new forms of communication as cable television), and installations outside of a tenant's demised apartment space, have in the past always been deemed takings requiring compensation. The desire of the State to promote a new communications medium or to regulate landlord-tenant relationships does not justify departure from this solid precedent. (Points IB, C and D).

The Court of Appeals' negation of the per se rule, if permitted to stand, will inevitably substantially discourage the enforcement of property rights against government-sanctioned physical invasions because the odds of success will have substantially diminished. In other ways too, it will diminish certainty of title. (Point IE).

Secondly, the Court of Appeals erred in the manner in which it applied the balancing test. If regulation-type anal-

ysis were properly applied to this case, it too must result in a finding that Section 828 is unconstitutional. The public benefit is modest since Section 828 cannot achieve the objective of preventing obstruction of crossover installations, while the second objective of preventing price-gouging of tenants is easily achievable by more conventional means. On the other hand, the questionable public benefit is outweighed by such factors as (a) the imposition on landlords' property rights; (b) the unfair bestowal of a free right-of-way upon one form of television transmission; (c) the availability of economically feasible alternatives; and (d) the imposition upon landlords of various out-of-pocket costs. (Point II).

ARGUMENT

POINT I

THE STATUTE VIOLATES THE TAKING CLAUSE BY AUTHORIZING A PERMANENT INSTALLATION ON PRIVATE PROPERTY WITHOUT CONSENT OR COMPENSATION*

The Court of Appeals improperly elected to apply the balancing test applicable to regulations, in lieu of the

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* Normally, a finding of unconstitutionality under the taking clause would require two elements: a taking, and a lack of just compensation. The second component has been eliminated as an issue in this case by the determination of the Court of Appeals that Section 828 does not require any compensation whatsoever for non-crossovers, but merely permits it at such level (not necessarily the constitutional level of "just compensation") as the Commission may prescribe, and that, furthermore, the statute does not even permit compensation in the case of cross-overs. (JSA22-24, 27-28, 35-37, and 71). These findings are binding on this Court. Scripto, Inc. v. Carson, 362 U.S. 207, 210 (1960); Wright, Federal Courts 488 (2d ed. 1970). Thus, the statute would not be sustainable even if Teleprompter had offered prior compensation or if, but for the Court of Appeals' ruling, the statute could be interpreted as requiring prior compensation (prior payment being required in the case of a taking by a private party--3 Nichols, Law of Eminent Domain § 8.712).

per se test applicable to physical occupations--a choice which, if sustained, would radically alter the law of eminent domain.

A. A Continuing Physical Occupation Constitutes A Per Se Taking and May Not Be Analyzed As A Regulation.

1. The Per Se Rule

The rule that de facto appropriation of an easement for communication wires constitutes a per se taking requiring just compensation is so clearly and firmly established as to have been seldom litigated.

The most explicit relatively current statement of this Court on the subject appears in United States v. Causby, 328 U.S. 256 (1946), where the Court recognized that, at least as to the usable space superadjacent to real property,*

* Airspace outside of this usable area is regarded as a "public highway." 328 U.S. at

(Footnote continued on next page)

the owner has an absolute right to exclusive possession. Quoting Butler v. Frontier Telephone Co., 186 N.Y. 486, 491, 492, 79 N.E. 716 (1906), the Court said:

> [A]n owner is entitled to the absolute and undisturbed possession of every part of his premises, including the space above, as much as a mine beneath. If the wire [a telephone wire in that instance] had been a huge cable, several inches thick and but a foot above the ground, there would have been a difference in degree, but not in principle. Expand the wire into a beam supported by posts standing upon abutting lots without touching the surface of plaintiff's land, and the difference would still be one of degree only. Enlarge the beam into a bridge, and yet space only would be occupied. Erect a house upon the bridge, and the air above the surface of the land would alone be disturbed. (328 U.S. at 265).

Causby and Butler conform to earlier

(Footnote continued from preceding page)
260-61. The concept is comparable to navigable waters, referred to as a "continuous highway" in Kaiser Aetna v. United States, 444 U.S. 164, 170 (1979). The concept of a navigational servitude or its equivalent is not applicable to this case as buildings, unlike air and water, do not constitute a natural medium of transportation or commerce.

holdings of this Court to like effect: the imposition of even the slightest easement, including one for a telegraph wire, constitutes a taking. E.g., St. Louis v. Western Union Telegraph Co., 148 U.S. 92 (1893); Western Union Telegraph Co. v. Pennsylvania Railroad Co., 195 U.S. 540 (1904).

In St. Louis, the issue was whether the telegraph company, under authority of a Federal statute authorizing it to install telegraph lines along mail routes could install lines along the public streets of the City of St. Louis without compensating the City. This Court held that such use would violate the taking clause:

> No one would suppose that a franchise from the Federal government to a corporation, State or National, to construct interstate roads or lines of travel, transportation or communication, would authorize it to enter upon the private prop-

> erty of an individual and appropriate it without compensation. No matter how broad and comprehensive might be the terms in which the franchise was granted, it would be confessedly subordinate to the right of the individual not to be deprived of his property without just compensation. And the principal is the same when, under the grant of a franchise from the national government, a corporation assumes to enter upon property of a public nature belonging to a State. . . . It matters not for what that exclusive appropriation* is taken, whether for steam railroads or street railroads, telegraphs or telephones, the State may if it chooses exact from the party or corporation given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated. (148 U.S. at 100-102; emphasis added).

This Court has explicitly endorsed the continuing validity of the rule that a physical occupation is a per se taking in Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979), holding that:

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* By "exclusive appropriation" the Court meant any installation no matter how small, which precludes inconsistent use of the same space, as in the case of a telegraph line along a road. See pages 65-66 infra.

> the "right to exclude," so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation. . . . And even if the Government physically invades only an easement in property, it must nonetheless pay just compensation.*

These statements correspond to the views of commentators. For example:

> The modern significance of physical occupation is that courts, while they sometimes do hold non-trespassory injuries compensable, never deny compensation for a physical takeover. The one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, "regularly" use or "permanently" occupy, space or a thing which theretofore was understood to be under private ownership. This may be true although the invasion is practically trifling from the owner's point of view.** Michelman, "Property, Utility and Fairness: Comments on the Ethical Foundations

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* See also Andrus v. Allard, 444 U.S. 51, 65 (1979).

** In fact, there is nothing trifling about the damages here. See note at 102, infra.

> of 'Just Compensation' Law," 80 Harv. L. Rev. 1165, 1184-85 (1967). (Emphasis in original).

See also Berger, L., "The Taking Problem," 49 N.Y.U.L. Rev. 165, 172 (1974); 2 Nichols, Law of Eminent Domain §§ 6.1[1], 6.2 and 6.21; 26 Am. Jur. 2d Eminent Domain § 161.

2. The Pennsylvania Coal Rule

This ancient rule that a physical occupation constitutes a per se taking must be distinguished from the parallel rule of relatively recent origin that regulation of the enjoyment of property which goes beyond what are essentially undefinable limits may also constitute a taking or a deprivation of property without substantive due process.

The most critical error of the Court of Appeals in this case was in failing to recognize the historical development of taking jurisprudence, through which the

second rule evolved as a distinct and separate principle.

Prior to Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), the taking clause was applied virtually exclusively to cases of actual seizure of title or of continuing physical occupation of property. Bosselman, Callies and Banta, The Taking Issue 105-23 (1973).* See, e.g., Transportation Co. v. Chicago, 99 U.S. 635, 642 (1878). In Pennsylvania Coal, this Court recognized a new concept of taking: that a regulation which goes "too far" in restricting property rights may also constitute a taking. Thus, a taking must be found on a per se basis if there is physical occupation, but may also be found on a balancing basis if property is regulated too stringently even though not occupied.

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* Hereinafter "Bosselman."

See dissent below (JSA79-91).

This Court highlighted the continuing sharp demarcation between occupation (per se) and regulation (balancing) in United States v. Central Eureka Mining Co., 357 U.S. 155 (1958), where, on the basis of a balancing approach, a regulation closing a gold mine during wartime was deemed not to require compensation. Yet, as noted in Central Eureka (357 U.S. at 165), compensation was required in the analogous case of United States v. Pewee Co., 341 U.S. 114 (1951) where the government "took" in a per se manner by "planting the flag" on the grounds and declaring the mine to be nominally under government ownership, even though it permitted continued operation thereof by and for the economic benefit of the original owner. The government's physical presence required application of the per se analysis and compensation even though far

more damaging results in Central Eureka required none.

The Court of Appeals in this case failed to appreciate that the Pennsylvania Coal view that regulation may constitute a taking added to the rights of property owners, which formerly extended only to compensation for a traditional per se taking. Rather than viewing the property owner's rights under both theories as cumulative, the Court of Appeals merged the new balancing analysis with the traditional per se rule, concluding that a balancing approach is required even where there is a direct physical appropriation of property. The Court of Appeals has thereby utilized what was intended by Pennsylvania Coal to expand property rights as a device for, in fact, taking away property rights.

B. The Owner's Right to Exclude Installations of the Instant Nature on a Per Se Basis Has Been Consistently Recognized in the Past.

The per se rule has previously been applied to easements similar to those under scrutiny here. Indeed, New York in particular has, until now, clearly recognized the right of owners of apartment houses to exclude virtually exactly the type of installation covered by Section 828, thus confirming the property rights of landlords in the present context. (Point IB(1) and (2)).

The Court of Appeals now seeks to justify the cancellation of these previously recognized property rights on the ground that Section 828 provides a new means of communication and is inherently a regulation of the landlord-tenant relationship. (JSA69, 70). The Constitution, however, does not recognize that novel ends justify confiscatory means,

nor does it provide any justification for taking private property merely because the owner rents to tenants. (Point IB(3)). Moreover, sound policy considerations militate against imposing CATV easements without compensation. (Point IB(4)).

1. Installation of Communications Lines

This Court has held that even a minimal invasion of private property for installation of communications lines constitutes a taking. Supra, at pages 18-21. New York too has repeatedly condemned the unauthorized installation of communications lines on private property either as a trespass or as a taking. See, e.g., Butler v. Frontier Telephone Co., 186 N.Y. 486, 79 N.E. 716 (1906) (trespass by wires which did not physically touch the property); Bunke v. New York Telephone Co., 110 App. Div. 241, 97

N.Y.S. 66 (1st Dep't 1905), aff'd, 188 N.Y. 600 (1907) (unauthorized attachment of wires to roof to reach other property); Osborne v. Auburn Telephone Co., 189 N.Y. 393 (1907), Dusenbury v. Mutual Telephone Co., 11 Abb. N.C. 440 (N.Y. Sup. Ct. 1882) and Eels v. American Telephone and Telegraph Co., 143 N.Y. 133 (1894)(unauthorized use of highway right-of-way); Buholtz v. Rochester Telephone Corp., 65 Misc. 2d 1071, 319 N.Y.S.2d 202 (Sup. Ct. Ontario Co. 1971), mod. on other grnds., 40 App. Div. 2d 283, 339 N.Y.S.2d 775 (4th Dep't 1973), app. dism. 33 N.Y.2d 939, 353 N.Y.S.2d 728 (1974) (installation of underground lines).*

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* Recognizing the tendency of urban property owners to allow telephone lines to be installed on and across their property for their own convenience and the undesirability of allowing such installations to become a cloud on title, New York provides that communications and electric line companies cannot acquire proscriptive easements on the basis of informal licenses from property owners. (Real Property Law §§ 261 and 335-a).

These holdings have been applied to cable televison facilities in Matteson v. Antenna-Vision, Inc., 54 Misc. 2d 859, 283 N.Y.S.2d 636 (Sup. Ct. Herkimer Co. 1967), holding that a cable television company must condemn if it installs equipment on private property without owner consent.*

As recently as 1977, the New York Court of Appeals confirmed the per se physical occupation rule by condemning as a taking an effort by a town to appropriate space for street lamps on telephone poles belonging to the New York Telephone Company. In New York Telephone Co. v. Town of North Hempstead, 41 N.Y.2d 691, 395 N.Y.S.2d 143 (1977), the town, purporting to act pursuant to its police power, installed street lamps on the

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* Cable television companies have the power to condemn under Transportation Corporations Law § 27. (See JSA22).

telephone company's poles. To bolster its position, the town adopted an ordinance, remarkably similar to Section 828, purporting to authorize such installations "without fee or charge." The Court ruled that the ordinance and conduct were not merely restrictions on the use of the telephone company's property, but worked "a transfer of the right to the particular use from the owner to the municipality and thus a taking." 395 N.Y.S.2d at 147.

> The elements of an appropriation . . . are present in this [such elements being:] an "actual appropriation or taking * * * by * * * governmental occupation", a "physical invasion of the owner's property", and an assumption by the [town] of the control of a portion of the owner Telephone Company's poles (citation omitted). (Cf. Delaware, Lackawanna & Western R.R. v. Morristown, 276 U.S. 182, 48 S. Ct. 276, 72 L. Ed. 523.) (395 N.Y. S.2d at 147).*

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* Having relied upon Delaware Railroad in New York Telephone, the Court of Appeals four

(Footnote continued on next page)

In the present case, the New York Court of Appeals attempts to distinguish its own decision in New York Telephone on the ground that the invasion there was for a "governmental purpose" whereas the invasion here is merely for the public benefit. (JSA46-47). The hollowness of this distinction is easily illustrated by hypothesizing that Teleprompter were owned and operated by the State.* Obviously in such a case, the Court of Appeals' distinction of New York Telephone would be inapplicable. Yet, the impact on the property owner is identical whether the cable company is owned privately or by government. Furthermore,

(Footnote continued from preceding page)
years later has in this case questioned Delaware Railroad's continuing validity. (JSA64). We show at pages 67-68, infra, that Delaware Railroad remains good law.

* Local governments are in fact beginning to operate CATV facilities directly. "Cities Fight to Keep Grip on Cable TV," New York Times, 9/1/81, p. A14, col. 1.

there is obviously "state action" behind Teleprompter's "private" conduct. The State has not only encourged Teleprompter to change its previous practice of obtaining consents from owners and compensating, but has also commanded landlords not to interfere with otherwise trespassory installations. See Reitman v. Mulkey, 387 U.S. 369 (1967); Peterson v. Greenville, 373 U.S. 244 (1963).*

2. Landlords' Rights of Exclusivity

The general principle that property owners are entitled to exclusive possession (particularly as to communications installations) has been applied in New York to the very type of installation in

* State action is additionally present in Teleprompter's case because of the pervasive participation of the City of New York in Teleprompter's broadcasting activities, including exclusive free use of several Teleprompter channels and use of Teleprompter facilities for "community" programming. (JtA155). See Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

question here. New York has confirmed the property right at issue here by consistently ruling in the past that landlords are entitled to exclude such installations or to receive compensation for them.

For example, a landlord's right to charge additional rent for cable television access was recognized under New York City rent regulations (JSA36n; see Schwartz v. McGoldrick, 118 N.Y.S.2d 154 (Sup. Ct. Kings Co. 1952) for a similar provision under State rent control as to a roof antenna); and landlords have a well-recognized right to take remedial action against tenants using roof space for antennas and the like. See, e.g., West Holding Corp. v. Cordero, 114 N.Y.S. 2d 668 (Sup. Ct. Kings Co. 1952) (window aerial prohibited); 349 E. 19th Street, Inc. v. Bernstein, 99 N.Y.S. 2d 299 (Sup. Ct. Kings Co. 1950); Prestipino

v. Matarazzo, 99 N.Y.S. 2d 606 (Sup. Ct. N.Y. Co. 1950) and Kaplan v. Ladimer, 197 Misc. 270, 97 N.Y.S.2d 642 (App. Term 2d Dep't 1950) (erection and maintenance of a wire by the tenant outside of his demised premises prohibited); and other cases cited in Annot. "Legal Aspects of Television" 15 A.L.R.2d 785 § 7.

3. Benefits do not justify Taking

The Court of Appeals attempts to justify Section 828 in part on the grounds that it promotes a new medium of communication "which has important educational and community aspects" and would benefit tenants. (JSA40).

One need not quibble with the premise that cable television is beneficial or that rents should be kept within reasonable levels in order to reject the conclusion that such benefits convert what was formerly a per se taking into a non-compensatory exercise of the police

power. As has been shown by the telephone and telegraph cases (pages 18-21, 28-30, supra), the mere fact that a means of communication is new and is sought to be promoted by government (as telephony and telegraphy undoubtedly were) cannot justify the invasion of private property without compensation. It is also obvious from Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), in which the unconstitutional legislation sought to prevent subsidence of a whole community of houses, that social utility may justify a taking, but it does not excuse compensation therefor. Social utility merely satisfies that part of the taking clause which requires that the exercise of the power of expropriation be "for public use."

This was fully recognized in an earlier day in New York when the installation of telegraph wires was held to require compensation:

> [P]ayment [must] precede appropriation, and [this conclusion] is reached in full view of all the consequences. It is known that the electric telegraph is the channel for the transaction of the commercial business of the world. By it space is annihilated and time reduced, modes of business are revolutionized and simplified. It has become the messenger of thought and the medium of communication. It has interlinked States and nations: and millions of capital have effected its construction and extension and if these views become prevalent they may be embarrassing to these large and useful companies.
>
> Yet the courts cannot turn aside nor close their portals. Constituted for the administration of justice to all alike, before them individuals and corporations are all equal. The voice of the weak and the powerful must impress the judicial ear the same, and all must receive even-handed justice. (Dusenbury v. Mutual Telegraph Co., 11 Abb. N.C. 440, 447 (N.Y. Sup. Ct. 1882)).

The Court of Appeals' declaration that regulation of the landlord-tenant relationship "is a separately recognized police power purpose" (JSA41)* may be

* The rent control cases cited by the Court of Appeals for this proposition are distinguished at pages 69-72, infra.

true but it has no significance. The exercise of the police power, if such it be here, is coupled with something more--a physical invasion by an outsider--and the question is whether that invasion constitutes a taking.*

This nation has already experienced the rapid expansion of the telephone system in the the early part of this century without any need to abandon the per se rule with respect to the installation of wires. The advent of cable television presents no greater justification for departing from clearly established judicial precedent under the taking clause.

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* Even when the exercise of so important a right as free speech is coupled with something more by which the rights and well-being of others are adversely affected, the right of free speech must accommodate. Milk Wagon Drivers Union v. Meadowmoor Dairies Inc., 312 U.S. 287 (1941). See National Labor Relations Board v. Babcock & Wilcox Co., 351 U.S. 105 (1956).

4. Policy Favoring Per Se Rule

Policy considerations strongly support preserving the right of the landlord to exclusive possession of those parts of his building which he does not specifically demise to tenants.

The issue is not merely the landlord's loss of rental income from the CATV companies, or from alternatives such as earth stations or master antennas,* although such losses are not insignificant. See page 102n, infra. Considerable additional burdens are imposed on the landlord by this statute. For example, unlike the situation where a television repairman is invited by the tenant into his own apartment and the tenant

* The prospect that a CATV company can get free access to tenants for cable installations is likely to discourage competing providers of alternative services from offering compensation to landlords for permission to install their services. See amicus curiae brief of National Satellite Cable Association, et al.

supervises the repairman and is responsible for his conduct, here the cable television installer and maintenance man work in the common areas of the building or even in areas (such as the roof) to which many landlords deny tenant access. This imposes on the landlord the practical (and perhaps moral and legal) burden of supervising the CATV installer or repairman to ensure the security of the landlord's property as well as the welfare of other tenants, and of warning the installer or repairman of any dangerous conditions.* See Prosser, Torts 376 et seq. (4th ed. 1971).

The landlord also loses the use of the space occupied by the CATV equipment for whatever purposes he might wish to apply it. Obviously in some cases this

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* The indemnification provision in Section 828(1)(a)(iii) appears to cover little or none of these risks.

is slight, as where the installation consists solely of a small cable. Where there is more (such as the large silver boxes on the Loretto property--see page 6, supra), an aesthetic nuisance may be created.* But it is also evident that some cable equipment is still bulkier and may prevent the landlord from using the occupied space for other substantial purposes. (See JtA61, 74-75, 131-2, 142, 166-71).** (Legally, of course, even the single wire displaces the landlord's possession and establishes a taking--see pages 65-66, infra).

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* Cf. People v. Stover, 12 N.Y.2d 462, 240 N.Y.S.2d 734, app. dismissed, 375 U.S. 42 (1963); People v. Goodman, 31 N.Y.2d 262, 338 N.Y.S.2d 97 (1972). This may be most annoying in a small building where the landlord personally resides, as in Appellant's case. (JtA12, 192, 151). To her, the installation without her permission, and the wires hanging down the front of her building, were "ugly" and a personal affront. (JtA99).

** In addition, Teleprompter uses the land-

(Footnote continued on next page)

Even where the installation consists of nothing but a single wire, if the landlord wishes to repair, demolish or add to his building where the wire is located, he must incur the inconvenience (and expense in terms of time and delay) of obtaining the cable company's cooperation in moving its cable. Yet the landlord gets no compensation for this.

There is also a potential for landlord liability if third persons are injured by CATV equipment installed on the landlord's property. See, e.g., Cesario v. Chiapparine, 21 App. Div. 2d 272, 250 N.Y.S.2d 584 (2d Dep't 1964) (servient estate owner may be liable to person injured upon right-of-way). See also Section 828(1)(a)(i) which may impose a duty on landlords to insist on the safe

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lord's electric power without compensating the landlord unless the latter has noticed the use and demands compensation. (JtA140-41, 144-47).

installation and maintenance of the CATV equipment.* Even if the landlord's duty in this regard were only to inform the cable company upon discovery of a dangerous condition, that duty constitutes an additional burden, and failure of the landlord to discharge it may result in substantial monetary damages.

Finally, there is the serious problem of where the principle espoused by the Court of Appeals would end. If the State may allow installation of one cable on the landlord's property to provide CATV services to his tenants, may it not permit uncompensated installation of a

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* The rather vague optional indemnification provision in Section 828(1)(a)(iii) provides little comfort since, at best, it gives the landlord who has been sued by a third party a claim over against the CATV company if the landlord has had the prescience to insist on getting an indemnification agreement from the CATV company. It is far from clear that this indemnification provision covers injuries to third persons; until clarified by case law, these are risks landlords must insure against or otherwise prepare to bear.

multitude of CATV and other communications cables?* May it not authorize other television companies to install earth stations on apartment house roofs for receipt of satellite-transmitted television signals?** May it not permit private companies to install solar panels owned by them on individual buildings

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* Nothing in Executive Law Article 28 precludes multiple franchises in a single area. It has been said that cable television is not a natural monopoly. Annot. "Validity and Construction of Municipal Ordinances Regulating Commmunity Antenna Television Service," 41 A.L.R.3rd 384, 388. In St. Louis v. Western Union Telegraph Co., 148 U.S. 92, 99 (1893), this Court observed:

> By sufficient multiplication of telegraph and telephone companies, the whole space of the highway might be occupied, and that which was designed for general use for purposes of travel entirely appropriated to the separate use of companies and for the transportation of messages.

** Section 828, on its face, would allow such an installation. See note page 98, infra. But even Teleprompter concedes that this would be improper, although Teleprompter fails to draw any logical line to prevent it. (JtA74-76).

without compensation in order to reduce tenants' expenses for energy? May it not authorize food and cigarette vending machine operators to place their equipment in apartment house lobbies for the convenience of tenants? May it not permit operators of coin-operated electronic video games to install their machines in apartment house lobbies for the amusement of (or even to facilitate "communication" with) resident teenagers? Or may it not allow coin-operated laundry machine operators to install their equipment in apartment house basements without compensating the landlords?

C. The Court of Appeals' Decision Erodes Historical, Philosophical and Psychological Foundations of Property.

The Court of Appeals' notion that continuing physical occupations of private property are to be weighed on the scale of public utility in the same

manner as regulations of the use of property is antithetical to the historical development and philosophical underpinnings of the American concept of property and inconsistent with human psychological needs.

1. History

Exclusivity of possession is a recurrent theme in Anglo-American history. This principle was embodied in Magna Carta (1215), which is generally credited with originating the guarantee against deprivations of freeholds (i.e., takings) at the level of fundamental law. But Magna Carta also expressed in numerous ways the opposition of landholders to incursions by the sovereign upon their exclusivity of possession. For example, it limited the right of the king to designate "forest" and riverbank areas where he might hunt (chapter 47) and prohibited the king from taking "a man's timber for

castle building or any other royal work without the consent of the owner of the wood" (chapter 39).

From the middle of the 13th century or earlier, owners engaged in enclosing common grazing lands and converting them to the owners' exclusive use. "Enclosure" was originally considered illegal because it deprived "commoners" of rights, but by the end of the seventeenth century it was accepted practice. Bosselman 70-75.* Thus, the American Colonists came to this land with substantial precedent for the folk rule that good fences make good neighbors. The theme of fencing, enclosure, and marking boundaries--all to exclude others--became a prominent theme in American lore, appear-

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* See Dunham, "From Rural Enclosures to Re-enclosure of Urban Land," 35 N.Y.U.L. Rev. 1238 (1960), indicating that enclosure required consent of, or compensation to, the commoners whenever it deprived commoners of economic value.

ing in the stone walls and white picket fences of the early colonies, the blazing of property lines as the frontier expanded, and the barbed-wire fencing of the West which became prevalent in the 1880s (Morison, Oxford History of the American People 757 (Oxford 1965).

In law, too, the fence became a significant metaphor of exclusive possession. For example, the common law writ which prevented even unintentional and non-damaging invasions was for trespass quare clausum fregit, i.e., for breaking the enclosure. The rigorousness with which liability ensued from trespass to land was explained in one English case on the principle that "the law bounds every man's property and is his fence." Starr v. Rookesby, 1 Salk. 335, 91 Eng. Rep. 295, 3 Blackstone's Commentaries 209 (1711). See also Shipman, Handbook of Common Law

Pleading 86-87 (3rd ed. West 1923).

2. Political Theory

The concept of private property and its immunity from sovereign invasion was so firmly ingrained in the Colonial consciousness that in writing the Constitution, the framers found little or no need to debate the taking clause. Bosselman 97-104.*

On the other hand, there is a wealth

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* Earlier individual state constitutions all contained bills of rights (Morison, op. cit. 272), commonly including taking clauses. See Virginia and Pennsylvania bills of rights at Morison, Sources and Documents Illustrating the American Revolution, 1764-1788, and the Formation of the Federal Constitution 150, 164 (2d ed. Oxford 1929); Bosselman 94-97. The Northwest Ordinance of 1787 also contains a taking clause, the wording of which elucidates the dual requirements--public purpose and compensation--of the 1789 Constitutional taking clause: "[S]hould the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same." It has been said that this Ordinance "stands on a footing with the Declaration of 1776" as a fundamental definition of American

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of philosophical writings which defined the spirit of the Revolutionary mind. These relied so heavily on the theories of John Locke--for whom the chief end of civil society was the preservation of property*--that it has been said that "American political thinking [at the time of the Revolution] was largely an exegesis upon Locke." (Miller, Origins of the American Revolution 170 (1943)).

Locke's teachings were echoed in Coke's Institutes, Blackstone's Commentaries and Henry Care's English Liberties, or the Freeborn Subject's Inheritance--all widely read and highly regarded by American lawyers of the Revolutionary era. Bosselman 88-92, 99-104. Black-

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liberties. 3 Channing, History of the United States 547 (Macmillan 1912).

* Second Treatise of Civil Government. While Locke concentrates heavily on "property" as we customarily define it, he does note that he includes in that term life and liberty as well.

stone reflects the central nature of the concept of exclusivity in ownership and possession of property in the American mind:

> So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. . . . [T]he public good is in nothing more essentially interested, than in the protection of every individual's private rights. . . . In this and similar cases the legislature alone can, and indeed frequently does, interpose and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subect of his property in an arbitrary manner; but by giving him full indemnification and equivalent for the injury thereby sustained. (Commentaries, quoted at Bosselman, 101).*

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* This recognition of the right to compensation evolved gradually over many centuries. Magna Carta also absolutely prohibited various invasions of property rights. (Supra at

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3. Territoriality

Anthropologists and psychologists suggest that the "fundamental" nature of the "right to exclude" is ultimately based on psychological dictates which, in turn, derive from species preservation imperatives. They suggest that man is like a multitude of animals in having a native need to stake territory and possess it exclusively.*

These psychological considerations have long been recognized by the American

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46-47). Mandatory enclosure occurred in England subject to compensation. (Supra at 47). Yet Locke (op. cit.) said that property could be taken only with consent. The principle that compensation could take the place of consent obviously took considerable time to seize hold.

* See generally M. Berger, "To Regulate or Not To Regulate--Is That the Question? Reflections on the Dilemma Between Environmental Protection and Private Property Rights," 8 Loyola of Los Angeles L. Rev. 253, 264-67 (1975). See also Konrad Lorenz, On Aggression (Harcourt, Brace & World 1966) (particularly 35-37), Edward O. Wilson, On Human
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judiciary. For example, Justice Holmes wrote in 1904:

> Property is protected because such protection answers a demand of human nature, and therefore takes the place of a fight. (Davis v. Mills, 194 U.S. 451, 457).

Earlier, this Court confirmed that

> [N]o class of laws is more universally sanctioned by the practice of nations, and the consent of mankind, than laws which give peace and confidence to the actual possessor and tiller of the soil. (Hawkins v. Barney's Lessee, 30 U.S. (5 Pet.) 457, 466 (1831))

And more recently, it has been written that:

> Historically, one of the great missions of the law has been to bring disputes concerning the possession of real and personal property under the control of legal institutions. Except for personal injury, nothing has been so productive of contention and violence as

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Nature (Bantam ed., 1979) (particularly 109-13); Robert Ardrey, The Territorial Imperative (Athenaeum, 1966); Stea, "Space, Territory and Human Movements," in Proshansky et al. eds., Environmental Psychology: Man and His Physical Setting 38 (1970); Desmond Morris, The Naked Ape 149 (Dell 1980 (particularly 149).

> the dispossession of tangible property. The taking of goods from another's possession, without the latter's contemporaneous consent, necessarily involves the hostile physical invasion of the possesser's personal territory, and is a serious assault upon his dignity, privacy and self-esteem. Such an invasion naturally tends to excite emotions and to provoke violent retaliation. (Watson v. Branch County Bank, 380 F. Supp. 945, 965 (W.D. Mich. 1974))

D. The Court of Appeals Has Misinterpreted Prior Decisions Of This Court.

In taking the approach that physical invasion cases and regulation cases should be analyzed similarly, the Court of Appeals has inevitably misinterpreted a number of key decisions of this Court.

1. Occupation is not regulation

There is no judicial precedent for analyzing physical occupation cases in the same way as regulation cases.

The Court of Appeals interprets Kaiser Aetna v. United States, 444 U.S. 164

(1979), as holding that an uncompensated physical occupation may be found unconstitutional only if it involves a substantial economic impact and impairs the property owner's investment-backed expectations.* (JSA54-61). This conclusion utterly ignores this Court's language in Kaiser Aetna:

> [T]he "right to exclude," so universally held to be a fundamental element of the property right, falls within [the] category of interests that the Government cannot take without compensation. This is not a case in which the Government

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* The economic loss to Kaiser Aetna resulting from deprivation of the right to exclude was actually comparatively modest. The developer could still charge for dockage and still enjoyed its principal objective: its profit from the development, at a cost of millions of dollars, of a 6,000-acre site having some 22,000 residents and 1500 waterfront lot lessees who enjoyed the pond as an amenity. 444 U.S. at 167-68, 169. Apparently, all the developer stood to lose was $72 per year paid by 1642 users of the pond, i.e., about $120,000 per year. 444 U.S. at 180. Thus, for Appellees to claim that New York property owners lose only an incidental benefit of their property ownership because their primary purpose is to rent apartments rather than cable space cannot avail Appellees in light of the equally incidental nature of Kaiser Aetna's loss.

> is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioner's private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina. . . . And even if the Government physically invades only an easement in property it must nonetheless pay just compensation. See United States v. Causby, 328 U.S. 256, 265 (1946); Portsmouth Co. v. United States, 260 260 U.S. 327 (1922). (444 U.S. at 179-80; emphasis added).

This Court's economic impact analysis* and reference to "reasonable investment-backed expectations" in Kaiser Aetna appears to be directed not to the question of whether there had been a taking but rather to the definitional question of whether a private property right existed under the peculiar circumstances of that case--i.e., whether Kaiser Aetna, having expended considerable efforts and

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* As discussed infra (pp. 91-107), Teleprompter's conduct here constitutes a taking even if analyzed on the basis of the economic impact standards mentioned in Kaiser Aetna.

funds to make the pond navigable, had thereby acquired a property right greater than would normally be the case with navigable waters so as to preclude application of the nagivational servitude doctrine. For this definitional inquiry, the Court looked to the subjective factor of what reasonable investment-backed expectations had been engendered by the Corps of Engineers and the developer's efforts and whether such expectations had the status of a property interest under the unique circumstances.

Once having determined on a subjective basis that Kaiser Aetna had a private property right not susceptible to the navigational servitude under common law, the Court applied a strictly objective per se standard to conclude that Kaiser Aetna was entitled to compensation for the imposition of an easement of public access. This explains the Court's

unqualified conclusion that the "'right to exclude' [is] universally held to be a fundamental element of the property right, [and] falls within [the] category of interests that the Government cannot take without compensation." 444 U.S. at 179-80.

Kaiser Aetna thus helps to clarify the utility of the "reasonable investment-backed expectations" test. That test is not required for the definition of traditional property rights. It can, however, assist in determining whether a property right is created by such extraordinary efforts as Kaiser Aetna exerted to make Kuapa Pond navigable, just as essentially the same test assists in determining whether an industrialist has made a sufficient investment and has shown appropriate regard for secrecy to make a customer list a trade secret. (See 55 Am. Jur. 2d, Monopolies, Retraints of Trade,

and Unfair Trade Practices § 708; 2 Callman, Unfair Competition § 54.2(c)(2)).

There is no such problem in defining property in the present case; it consists simply in title to real property. Moreover, as appears from the discussion in Points IB(1) and (2) above, the property right of landlords to exclusive possession--particularly as against television installations--has hitherto been firmly established in New York.

The Court of Appeals also invokes Agins v. City of Tiburon, 447 U.S. 255 (1980), a zoning case, for the proposition that regulation does not amount to a taking if it does not "unreasonably impair the value of use" of property. (JSA 55-6). This truism in no way advances the analysis of the present case as Agins, unlike the present case, clearly involves no physical appropriation, occupation or invasion whatsoever.

Similarly, the Court of Appeals ignored the pure regulatory context of Andrus v. Allard, 444 U.S. 51 (1979), in citing that case for the proposition that "the denial of one traditional property right does not always amount to a taking." (JSA57-58). The accuracy of that observation in the context of a prohibition against the sale or transport of objects made from eagle feathers does not bear in any way upon a statute which authorizes a direct physical appropriation and occupation.* As with the other cases discussed above, Andrus does not support the Court of Appeals' proposition that regulation analysis may be applied to a physical occupation.

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* In distinguishing Andrus v. Allard from fee expropriation cases, this Court in Kaiser Aetna itself confirmed the inapplicability of Andrus and similar cases to the present case. (444 U.S. at 179-80).

2. Occupation Is Per Se Taking

The Court of Appeals also adduced no authority to negate the applicability of the per se test to all physical occupation situations. Although it relied heavily upon PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980), PruneYard is distinguishable on two principle grounds. First, it involves a shopping center assuming the role of a civic center and open to the general public, whereas the present case involves private apartment houses open only to rent-payers selected by the landlord whose access is limited to their own apartments and defined common areas. Second, PruneYard at most involves transient entries, whereas the present case involves permanent installations.

With regard to the first point, the PruneYard decision is carefully limited to large mall-type shopping centers

falling within the fact pattern of Marsh v. Alabama, 326 U.S. 501 (1946), in which this Court held that where an owner creates an environment on his property which simulates and, as a practical matter, totally serves the functions of an urban civic center, and the owner invites the general public onto such property, then the owner may not restrict the exercise of free speech any more than could a governmental entity owning a civic center.*

* Justice Powell, in his concurring opinion in PruneYard, particularly emphasized the limitation of the PruneYard holding to buffered mall-type shopping centers and not to others, no matter how open to the public. (447 U.S. at 96). See Central Hardware Co. v. National Labor Relations Bd., 407 U.S. 539, 547 (1972) holding that the reasoning of Marsh v. Alabama, supra, cannot be applied to a single store isolated within a parking lot because it, unlike a large mall-type shopping center, does not assume to any "significant degree the functional attributes of public property devoted to public use." Similarly, Hudgens v. National Labor Relations Bd., 424 U.S. 507, 519 (1976) restricts Marsh to cases where the private owner is "performing the full spectrum of municipal powers and stand[s] in the shoes

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PruneYard does not require the property owner to admit any group of persons to his property.* It simply holds that once the owner of a civic center equivalent has opened up his property to the general public, the state may constitutionally regulate the owner's right to prohibit exercises of free speech commonly conducted in similar public plazas.** Here, of course, the landlord had

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of the State." See also Justice Blackmun's dissent in Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 552 (1980), explaining that PruneYard "voluntarily chose to open its grounds to the public and therefore the State could require that the center permit the exercise of speech rights on the property."

* The California Supreme Court took pains to emphasize that appellants were members of the class invited onto the property and were rightfully present; the issue was solely whether the center owner could preclude them from exercising free speech. Robins v. PruneYard Shopping Center, 23 Cal. 3rd 899, 905, 910, 592 P.2d 341 (1979).

** The right to communicate, to the extent it might come into play in this case, would merely justify the taking as being for a
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neither opened up his property to the general public nor assumed the role of government.

Secondly, PruneYard is distinguishable from the case at bar because PruneYard involves only transient entry, not physical installation on private property.* This distinction is drawn clearly

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"public purpose" (without excusing compensation) as more than free speech--i.e., a permanent physical installation--is involved here. See pages 37-38, supra. See also discussion at Point IIB below showing that the communications interest here is not strong enough to outweigh the right to exclusive possession or compensation in view of available alternatives.

* Indeed, counsel for the Appellee in PruneYard went a step further and asserted that the case involved no physical invasion at all:

> The PruneYard is open to the public during operating hours and it has never been contended that the students, or any members of the public, do not have access to the property. Therefore, this is not a physical invasion case, and the reasoning behind the taking rule of Kaiser Aetna should not be applied. (Appellees' Br. 35).

in St. Louis v. Western Union Telegraph Co., 148 U.S. 92 (1893), which held that Federal authorization to a telegraph company to install its lines over public streets would constitute a taking requiring just compensation. The St. Louis Court confronted the argument that such public streets were fully open to vehicular and pedestrian traffic; accordingly, why should the very modest installation of the telegraph company be deemed a taking? This Court found the answer in the difference between transient passage and permanent installation:

> The use which the defendant makes of the streets is an exclusive and permanent one, and not one temporary, shifting and in common with the general public. The ordinary traveller, whether on foot or in a vehicle, passes to and fro along the streets, and his use and occupation thereof are temporary and shifting. The space he occupies one moment he abandons the next to be occupied by any other traveller. This use is common to all members of the public. But the use made by the telegraph company is, in respect to so much of

> the space as it occupies with its poles, permanent and exclusive. It as effectually and permanently dispossesses the general public as if it had destroyed that amount of ground. Whatever benefit the public may receive in the way of transportation of messages, that space is, so far as respects its actual use for purposes of a highway and personal travel, wholly lost to the public. (148 U.S. at 98-99).*

Here too, of course, there is a permanent installation. Although in one instance the installation may consist merely of a single cable and occupy only

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* See also Southwestern Bell Telephone Co. v. Webb, 393 S.W.2d 117 (Mo. App. 1965), in which the court responded to appellant's argument that "not one single iota of defendant's land was actually taken" by the installation of an underground wire as follows:

> If no land has been taken, where is the cable? Where will its fellows be when the time comes to lay them? . . . We think that to the extent the land is invaded and the owner's proprietary rights in it are taken, the land is taken. (393 S.W.2d at 121).

For the distinction between a permanent occupation (constituting a taking) and a temporary trespass (not constituting a taking), see also Central Hardware Co. v. National Labor Relations Bd., 407 U.S. 539 (1972).

a small amount of space, other instances involve installation of more substantial equipment such as power supplies (supra at 40-41; JtA142, 166-71), and the potential exists for vast multiplication of cables and other equipment.

PruneYard is distinguishable from Delaware, Lackawanna & Western Railroad Co. v. Town of Morristown, 276 U.S. 182 (1928), which the Court of Appeals incorrectly suggests has been implicitly overruled by PruneYard. (JSA64). In Delaware Railroad, the appropriation of particular space for a taxi stand was found to be unconstitutional. If California had set aside a particular segment of the shopping center mall as a little "Hyde Park" for the exercise of free speech, rather than merely precluding the center from prohibiting petitioning, we submit that such action would have been condemned as an appropriation

of private property exactly as this Court did in the Delaware Railroad case.

In sum, this Court did not hold in PruneYard that the state may freely permit uninvited persons to make permanent unauthorized installations on private, non-public property. Yet Section 828 does precisely that by expropriating to Teleprompter's commercial use property which is not only not open to the general public but from which the owner earns his economic return precisely by exercising his right of exclusion--i.e., by permitting occupancy only by that limited group of persons which he has selected and which pay rent to him for the privilege of occupancy.

The Court of Appeals also rested its rejection of the per se rule on Jackman v. Rosenbaum Co., 263 Pa. 158 (1919), aff'd, 260 U.S. 22 (1922). It is true that the state court decision in Jackman

v. Rosenbaum Co. sustained the denial of a cause of action based upon allegedly trespassory occupation by a party wall on two alternative grounds: (i) that party walls straddling property lines do not constitute a trespass under long-standing common law,* and (ii) that the state may, in any event, permit a modest physical appropriation of property in the exercise of its police power. This Court, however, in affirming, rested its decision solely on the Pennsylvania common law premise, thereby implicitly rejecting the notion that a taking does not occur just because the state finds it expedient to permit one owner to occupy a portion of his neighbor's land.

The rent control cases--People ex

* Philadelphia provided for party walls and specified their required thickness from early Colonial times. As early as 1189, English law provided for reciprocal obligations of neighbors with respect to construction of party walls. Bosselman 62, 83.

rel. Durham Realty Corp. v. LaFetra, 230 N.Y. 429 (1921), app. dismissed, 257 U.S. 665 (1921), and People ex rel. Rayland Realty Co. v. Fagan, 194 App. Div. 185, 186 N.Y.S. 23 (2d Dep't 1920), aff'd, 230 N.Y. 653 (1921)--were cited below as involving "[n]o less an invasion of the right to exclude than that of which plaintiff complains." (JSA50). These cases passed upon a statute suspending the right of landlords to evict tenants for a period of two years. The decision in Durham rested upon the fact that prior compensation was in fact paid in the form of fair rental value. (230 N.Y. at 444).* The cases, therefore, fit within traditional eminent domain concepts, although they are also distinguishable on the grounds of the short duration of the statute and the emergency

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* Cf. note pages 102-103, infra.

crisis it sought to resolve.

Block v. Hirsh, 256 U.S. 135 (1921), a rent control case cited by the Court of Appeals (JSA40 at 41, 43) is also distinguishable. In Block, this Court, by Justice Holmes (in a 5-4 split), determined that a Washington D.C. rent law prohibiting evictions (provided the tenant paid rent at the existing level) was constitutional because of: (1) the existence of a war-generated public emergency; (2) the short duration of the statute (not more than two years); and (3) the concept that "the preference given to the tenant in possession . . . is traditional in English law" (256 U.S. at 157) and, therefore, by implication not violative of property rights. Even so, only a year after its issuance, Justice Holmes himself described his Block opinion as reaching "the verge of the law." Pennsylvania Coal Co.

v. Mahon, 260 U.S. 393, 416 (1922).*

The statute in question here goes beyond "the verge of the law" and its constitutionality is not governed by Block. Section 828 is not necessitated by any public emergency;** it is not temporary but permanent; and it is not sustainable by reference to any traditional common law right of others to make physical installations on private property.

The Court of Appeals cites dicta in Pumpelly v. Green Bay Co., 80 U.S. [13 Wall] 166 (1871) (JSA64-5), and United States v. Cress, 243 U.S. 316 (1917) (JSA47n) to the effect that a physical invasion of property constitutes a taking

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* It should be noted that Block and the New York rent control cases were all decided in the pre-Pennsylvania Coal era when the taking clause was not believed to apply to regulations. See pages 23-26, supra.

** Executive Law § 811 declares not that cable television is essential in any way, but merely that its propagation would be "beneficial."

only so long as the resulting damage is "substantial" or effectively destroys the property's usefulness.* But in both of these cases, the invasion was indirect, resulting from water displaced through the construction of dams on parts of the waterway not located on the plaintiff's property. In such a case, it is self-evident that unless the presence of water is "substantial," one cannot determine whether it is a temporary situation or a natural condition differentiable from a taking. See Sanguinetti v. United States, 264 U.S. 146 (1924). Thus, Pumpelly and Cress do not apply to a direct, intentional and permanent invasion such as exists in the present case.

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* In both cases, this Court found a taking so that it is impossible to conclude from the decisions that the Court would not have found a taking had the damage been less "substantial."

In sum, not a single case cited by the Court of Appeals for the proposition that physical occupation of property does not necessarily constitute a taking supports that proposition.*

E. Dilution of the Per Se Rule Would Drastically Alter Existing Property Concepts and Discourage the Enforcement Of Property Rights.

If, as the Court of Appeals has held here, a taking does not occur in the case of a physical occupation unless the occupation significantly impairs the property owner's use of his land, then juridical results formerly viewed as certain must be totally re-thought. For example:

-- While a bridge spanning private

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* Noble State Bank v. Haskell, 219 U.S. 104 (1911), Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 271 N.Y.S.2d 955 (1966), and Ayres v. City Council of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1 (1949) (JSA53) all involve no physical invasion but merely exactions for mutual benefit or as a condition of receiving a privilege.

property may still be viewed as a taking, it becomes doubtful whether in all instances a wire, identically located, would constitute a taking. This view, of course, is contrary to that expressed in United States v. Causby, supra, St. Louis v. Western Union Telegraph Co., supra and Western Union Telegraph Co. v. Pennsylvania R. Co., supra (all of which are discussed at pages 18-21 above).

-- One would expect that the installation of telephone poles across the front property line of a conventional residential urban or suburban building lot would continue to be viewed as a taking. See cases cited at pages 28-30, supra. But, under the Court of Appeals' reasoning, such a result becomes doubtful when the telephone poles are installed across a steep and otherwise unusable corner of a large rural property.

-- Similarly, the taking of an ease-

ment for highway purposes may be viewed as requiring condemnation and compensation, but the subsequent addition of telephone lines within the right-of-way may be viewed as de minimis and non-compensable. This would clearly be contrary to Western Union Telegraph Co. v. Pennsylvania R. Co., 195 U.S. 540 (1904), and to the traditional view that the outcome of such a case depends solely on whether the additional use is within the scope of the original easement. See, e.g., Osborne v. Auburn Telephone Co., 189 N.Y. 393 (1907); Heyert v. Orange and Rockland Utilities, Inc., 17 N.Y.2d 352, 271 N.Y.S.2d 201 (1966) (use of highway right of way for installation of gas main is a taking from the servient estate owner).

-- Under the Court of Appeals' view it might be thought that underground pipelines barely affect the usefulness of

property so that no compensation would be required in such a case. This, however, contradicts Heyert v. Orange and Rockland Utilities, Inc., supra, and Southwestern Bell Telephone Co. v. Webb, 393 S.W.2d 117 (Mo. App. 1965).

Under the per se rule, an owner on whose property a physical installation had been made knew with certainty that if he sued to protect his right to exclusive possession the only significant issue would be the measure of damages. Under the ruling of the Court of Appeals below, before suing, he now must take into account the additional risk and expense of litigating the subjective issues of the degree of limitation of his residual use, and the degree of public benefit achieved by the so-called "regulation."* The con-

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* As Chief Judge Cooke observed in his dissent below, the property owner would also face a radically different burden of proof. (JSA87-88).

sequent strains on the enforcement of property rights must significantly reduce confidence in the institution of property ownership.

Finally, Section 828 creates a cloud on titles, thus upsetting the policy of title registration to ensure certainty of title. Title companies generally except from their coverage any state of facts an accurate survey would show--including the presence of a wire crossing the property even though no easement is recorded.*

The foregoing recitation of burdens imposed on landlords by Section 828--some small, some large--illustrates the mischief which can result from that statute.

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* In the case of a CATV cable, that wire is even described by the Commission as constituting an "easement." (JtA51-52). See note at 29, supra, regarding New York's effort to avoid title clouds with respect to telephone lines. See Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), as an example of the burdens whch can result from conflicting ownership interests in the same property.

It demonstrates substantial uncertainties as to duties, expenses, title clouds, and rights of exclusive possession which inevitably flow from Section 828. Such uncertainties are, in themselves, an evil, for we submit that property ownership, enjoyment and exchange thrive on certainty.

POINT II

EVEN IF VIEWED AS A REGULATION, SECTION 828 VIOLATES THE TAKING AND DUE PROCESS CLAUSES

Although this case is a clear-cut instance of a *per se* taking, Section 828 and Teleprompter's conduct also constitute a taking or a deprivation of property without due process when analyzed under police power regulation standards.

In applying its regulation analysis, the Court of Appeals overemphasized and misinterpreted a limited number of narrow criteria. (Point IIA). When analyzed in

proper manner as an exercise of the police power, Section 828 violates substantive due process and taking standards in that the statute utilizes means not reasonably calculated to achieve its ends (Point IIB(1)), in that the public benefit objectives of the statute are heavily outweighed by its negative effects (Point IIB(2)), and in that there are reasonable alternatives available (Point IIB(3)).

A. The Court of Appeals Has Misconstrued Various Balancing Factors.

The Court of Appeals nominally recognized that the factors which must be weighed in determining the validity of a police power regulation are essentially undefinable and that the "[r]esolution of each [case] * * * ultimately calls as much for the exercise of judgment as for the application of logic" (quoting Andrus v. Allard, 444 U.S. 51, 65 (1979)). (JSA

43-44). This balancing test has been expressed in various terms but essentially remains undefinable. For example, in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922), the Court inquired into whether the regulation had gone "too far." In Goldblatt v. Hempstead, 369 U.S. 590, 595 (1962), the inquiry in part was whether the means adopted are reasonably calculated to achieve legitimate ends. In PruneYard Shopping Center v. Robins, 447 U.S. 74, 83 (1980), the Court asked "whether the restriction on private property 'force[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,'" and observed that this, in turn, requires an "inquiry into such factors as the character of the governmental action, its economic impact,*

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* This factor is discussed in Point IIB.

and its interference with reasonable investment-backed expectations."

Having recognized the breadth of the balancing test, the Court of Appeals then improperly concentrated exclusively on three particular factors (character, economic impact and interference with reasonable investment-backed expectations) which in part are inapplicable and in part were misapplied by that Court.

1. Character

The Court of Appeals utilized the "character" factor in a manner which is unsustainable in precedent or logic.

In Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978), this Court clearly indicated that "physical invasion" defines the "character" of governmental action as a taking. In Kaiser Aetna, the Court recited "character" as a factor (444 U.S. at 175) and, without specifically discussing the mean-

ing of that term, held that the imposition of an easement of navigation constitutes a taking, thereby implicitly defining improper "character" as including physical invasion or imposition of an easement.

The Court of Appeals, however, redefined the "character" test as an inquiry into whether government has acted in its "arbitral" or "enterprise" capacity in enacting the statute. The Court of Appeals proposes that if government acts in its "enterprise" capacity--taking private resources for the common good, such as where it takes land to widen a road--the action is a taking. However, where government "arbitrates" between competing private interests in land use, the action is not a taking. The Court of Appeals concludes that Section 828 is "arbitral" because it does not take property for governmental use but "arbitrates" between

the interests of CATV companies and consumers on the one hand and landlords on the other hand. (JSA44-47).

The fallacy of this rather metaphysical definitional inquiry is easily illustrated by our previous hypothesis that Teleprompter were a government-owned enterprise. (See pages 32-33, supra). In that case, it would be clear that the seizure of an "easement" over private property would be an "entrepreneurial" act characteristic of a taking. No adequate explanation can be advanced as to why the results should be different if government authorizes a private company to seize exactly the same "easement."

Such analytical difficulties have in fact compelled the author of the "arbitral/enterprise" distinction himself to abandon that test on the ground that he "now view[s] the problem as considerably more complex" than he had in the

earlier work cited by the Court of Appeals. (JSA 45). Sax, "Takings, Private Property and Public Rights," 81 Yale L.J. 149-51 (1971).*

2. Investment-Backed Expectations

We have suggested above that the "reasonable investment-backed expectations" test is suitable only to assist in determining whether a property right exists in cases where investment is a factor in the creation of property, but is not useful in determining whether a property right has been taken. (Supra at 56-59).

The Court of Appeals misconstrues the "reasonable investment-backed expectations" test in applying it to deny the existence of a taking except where

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* This Court has implicitly recognized the uselessness of the analogous "governmental/proprietary" distinction in governmental tort immunity cases in Owen v. City of Independence, 445 U.S. 622, 644-50 (1980).

the investment has been made for the specific purpose of realizing income from the particular rights affected by the regulation. Thus, the Court of Appeals claims that landlords have no "reasonable investment-backed expectation" of realizing income from CATV installations because their buildings were not built as supports for CATV lines but only for the purpose of renting apartments. (JSA58-63).

This represents an insupportably restrictive view of the holding in Kaiser Aetna.* If it were correct, then a railroad, having acquired its right-of-way for railroad purposes but not for

* As appears from the note at 55, supra, Kaiser Aetna's revenues from the pond are insignificant in the context of the total project and it is unrealistic to think that Kaiser Aetna developed the pond with the objective of earning revenue directly from fees for its use rather than as an amenity enhancing the marketability and price potential of the surrounding residences and lots.

rental to others, could not preclude a telegraph company from installing poles and lines along the railroad right-of-way without compensation because the railroad would have no "reasonable investment-backed expectation" of earning a return from the otherwise unoccupied space on which the telegraph company proposes to install its lines. Yet the railroad would in fact clearly be entitled to compensation. Western Union Telegraph Co. v. Pennsylvania R. Co., 195 U.S. 540 (1904). The present case is actually stronger than Western Union because landlords have invested in their properties specifically for the purpose of producing rental income, whereas railroads invest in rights-of-way principally to operate their own trains.

Moreover, the facts of this case fall squarely within even the Court of Appeals' restrictive interpretation of

the "reasonable investment-backed expectations" test. Prior to the effective date of Section 828, any investor in residential rental property in New York would have invested with the legal right (and, therefore, the reasonable expectation) of being able to preclude, or receive compensation for, any kind of installation outside of the tenant's apartment for the reception of television signals, and would have taken such "other income" received by the prior owner into consideration in determining whether to purchase, and at what price. (Supra at 33-35).

Thus, Section 828 deprives investors in rental buildings of an established market for additiional income for installations outside of demised space and, therefore, deprives investors of a "reasonable investment-backed expectation."

3. Alternative Means Test

The Court of Appeals also erred in asserting that the availability of alternative means to achieve the same end is an irrelevant consideration. (JSA42-43). This Court in National Labor Relations Bd. v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956), held that precisely such an inquiry into available alternatives is appropriate and even mandatory. There the Court said that accommodation between the government's regulatory interest and the owner's property rights "must be obtained with as little destruction of one as is consistent with the maintenance of the other." If the regulatory objective can be accomplished with less impact on property rights, that approach must be selected.*

* The holding in Babcock & Wilcox--that the NLRB might constitutionally permit entry by non-employee union organizers upon the

(Footnote continued on next page)

Similarly, in Kaiser Aetna v. United States, 444 U.S. 164, 179 (1979), this Court was evidently influenced by the fact that the Army Corps of Engineers had failed to avail itself of the reasonable alternative of advising Kaiser Aetna at the time it gave permission for dredging that the Corps would view the transformation of Kuapa Pond into a navigable waterway as creating a navigable easement.

Finally, the Court of Appeals erred in contending that the balancing analysis

(Footnote continued from preceding page)
property of a private industrial company—has been explained in part on the grounds that (i) the entry is transient and does not usurp exclusive occupancy of a specific space; (ii) it is strictly limited in time to the duration of an organizational campaign; and (iii) it may be condoned only where the plant is so isolated that effective access to employees cannot be gained in any other way. Central Hardware Co. v. National Labor Relations Bd., 407 U.S. 539 (1972). These factors distinguish Babcock & Wilcox from the present case where the installation is permanent and pre-emptively occupies specific space, and where the communication can be delivered through any number of alternative means. (See note at page 96, infra.)

may not take into account the fact that Section 828 was enacted at least in substantial part for the private benefit of commercial companies. This Court has held that the Constitution affords lesser protection to commercialism even in such a sensitive area as free speech. See Breard v. City of Alexandria, 341 U.S. 622 (1951).

* * *

We therefore submit that Section 828 cannot be sustained under the relatively formal tests of character and reasonable investment-backed expectations and the Court of Appeals was wrong to ignore the existence of alternative means of accomplishing the ostensible objections of the legislature, and the fact that a commercial interest was being served.

B. The Burdens Imposed by Section 828 Far Outweigh Its Social Utility.

The Court of Appeals observed that

the purposes of Section 828 are twofold. One is to assure "rapid development of and maximum penetration by a means of communication which has important education and community aspects" (JSA40), by preventing landlords from frustrating the availability of CATV service by refusing consent for installations or charging exorbitant fees. (JSA32-33, 40-41). The second purpose, the Court said, is to prevent additional charges from being passed on to the tenant which would amount to an increase in rent. (JSA41-42).

The legislation, as interpreted by the Court of Appeals, accomplishes neither of these goals while at the same time it so burdens landlords as to substantially outweigh any public benefits which might otherwise be achieved.

1. <u>The Utility Is Minimal</u>

The Court of Appeals construed Sec-

tion 828 as applying only to properties owned by "landlords" (i.e., rental properties). (JSA26, 69). So construed, the statute cannot accomplish the purpose of ensuring that successive properties along a projected transmission line can be fully wired without impediment from recalcitrant owners. Obviously the owner of any non-rental property along the planned route of a cable installation can still--notwithstanding Section 828--frustrate the installation of equipment to service subsequent properties as much as such an owner ever could before.

It is not clear why Section 828 should even be regarded as potentially justifiable by a fear that permitting landlords to charge either their tenants or cable television companies for the right to install CATV facilities would result in the effective equivalent of an increase in rent. The usual view is that

the providing of an additional benefit or service warrants an increase in rent, even under rent control. See pages 33-35, supra. It is clear, however, that there is no direct relationship between payments by CATV companies to landlords and the allocation of the cost thereof to tenants so as to amount to the equivalent of a rent increase. In fact, quite obviously, the additional cost of compensating landlords (and other owners, for that matter) would be not passed on in the form of a rent increase but would be passed on only to subscribers (some of whom are not even tenants), just as Teleprompter undoubtedly does in the case of the fee it pays to the City of New York for the use of its streets.*

* Although termed a "franchise fee," this payment is not for the right to conduct business but is, in reality, rent for the use of the street space. The business franchise comes from the State. See People's Cable

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Furthermore, the implicit fear that landlords will "gouge" tenants or frustrate installations by exorbitant charges for rights-of-way is a red herring. Payments by cable companies to landlords under the taking clause are constitutionally limited to the level of "just compensation." Furthermore, direct charges either by landlords to tenants, or by cable companies to subscribers, may always be subject to price controls.*

Finally with respect to the affirma-

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Corp. v. City of Rochester, 70 Misc. 2d 763, 334 N.Y.S.2d 972 (Sup. Ct. Monroe Co. 1972), aff'd, 41 App. Div. 2d 585, 340 N.Y.S.2d 883 (4th Dep't 1973); Harper v. City of Kingston, 17 Misc. 2d 627, 188 N.Y.S.2d 577 (Sup. Ct. Albany Co. 1959).

* Cable service rates are controlled anyway by municipal and State provisions. See Excutive Law § 828 and Teleprompter's New York City franchise, Exh. E to B. Simon Aff. 2/78; Exh. Q to Gruen Aff. 4/28/78. If landlords are paid by cable companies, then it would appear permissible for the State to prohibit the landlords from charging tenants for cable service except to the extent the landlords provide an additional benefit such as inside wiring.

tive factors to be weighed in favor of the legislation, it should be noted that even the governmental regulatory interest here is practically non-existent. The government's interest in facilitation of maximum penetration of cable television installations is hardly one which can be compared to promoting free political speech (as in, for example, PruneYard)*

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* If Teleprompter has a free speech message to deliver, it can do so by any number of alternative means such as conventional or master antenna television, radio, mail, telephone, advertising, leafletting, etc., or by compensating for access to apartment houses. It is streets, squares, sidewalks, parks and the equivalent, rather than private apartment buildings, which are recognized by the courts as "so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely." Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) (overruled by Hudgens v. National Labor Relations Board, 424 U.S. 507 (1976) without affecting the quoted language except insofar as it relates to privately-owned equivalents of such streets, and the like).

or ensuring public health and safety (as in, for example, the New York City Building Codes which require smoke detectors and fire escapes). The New York legislature itself does not view the promotion of cable television as being necessary or essential to the public welfare and recites in the statute merely that the public would "benefit" from the nurturing of cable television. Executive Law § 811.

Thus, there is little social need that justifies the enactment of Section 828 and little in the way of social usefulness that is accomplished by it.

2. The Burdens Are Substantial

In contrast to the rather weak legislative motivation and the ill-suited means of accomplishing its ends are a substantial number of serious economic and political repercussions to landlords.

The advent and spread of television brought with it a desire for improved

reception and broader programming availability. The new technology has created a market for roof space and other space external to individual apartments for the installation of tenants' own antennas, master antennas, earth stations and the like,* for which the landlord would have previously charged. See supra at 33-35.

The enactment of Section 828 precludes the landlord from realizing any return from conventional cable television and perhaps also from earth stations.** As a practical matter, Section 828 also impairs the landlord's ability to market

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* See amicus curiae brief of National Satellite Cable Association et al.

** Technically, it would appear that the definition of "cable television" in Executive Law Section 812(2) and (6) would cover an earth station receiving satellite transmissions as the earth station would receive signals from non-local stations and, therefore, would not qualify as an exempt "master antenna television system." But see page 44, supra.

master antenna services (or earth station services) as Section 828 precludes any period of exclusivity which would be required to amortize the capital cost of installation.* Thus, the statute purports to deprive landlords of an established existing market and this is a significant economic loss to them.

On the other hand, cable television companies enjoy a substantial windfall under Section 828. Previously, Teleprompter had, as a general rule and as matter of management policy, paid 5% of gross revenues to landlords pursuant to form contracts prepared by them for the privilege of installing cable and related equipment on their property, thus reflecting Teleprompter's own assessment of appropriate market price for its use of private property. (JtA32, 136, 143-

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* Teleprompter's own contracts with landlords also required exclusivity. See JtA32.

44, 163-65). If Teleprompter wishes to use any alternative method of access (in preference to a crossover), it clearly would have to pay for that privilege. For example, Teleprompter continues to pay 5% or more of its gross revenues to the City of New York for the privilege of installing cables and other equipment under the public streets. (N.Y.C. franchise, Exh. E to B. Simon Aff. 2/78, Exh. Q to Gruen Aff. 4/28/78). When Teleprompter utilizes the under-the-street ducts of Empire City Subways, Inc. it must pay for them. (See Gruen Aff. 4/28/78 Exh. K pg. 5). Similarly, when cable companies use telephone poles in rural areas they undoubtedly pay for that privilege. (Supra at 28-31; see People's Cable Corp. v. City of Rochester, 70 Misc. 2d 763, 334 N.Y.S.2d 972 (Sup. Ct. Monroe Co. 1972), aff'd, 41 App. Div. 2d 585, 340 N.Y.S.2d 883 (4th Dep't 1973).

But with respect to landlords, cable television companies no longer have to pay.

Thus, a source of income to landlords has been eliminated while cable companies have saved themselves whatever the cost would otherwise have been of acquiring rights of way. But there is no "reciprocity of advantage" (Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)) for this reallocation of economic burden and benefit. Under Section 828, the economic benefit inures directly to cable television companies and indirectly perhaps, to subscribers (tenant and non-tenant alike). The burden, however, is imposed entirely on a limited class consisting of landlords, and they receive no benefit from bearing this burden.* The

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* It cannot avail Teleprompter to argue that the economic effect of this "regulation" on Appellant and class members is slight. As

(Footnote continued on next page)

consequence is politically facile but flies in the face of such cases as Armstrong v. United States, 364 U.S. 40, 49 (1960) and Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893) which hold that regulations may not arbitrarily allocate the economic burden to a small segment of the population in order to provide a benefit to the public at large.*

(Footnote continued from preceding page)
shown by United States v. Causby, 328 U.S. 256, 264-65 (1946), stringing wires has the requisite economic impact to constitute a taking. The same is true in Kaiser Aetna. See note at page 55, supra. In this case, Appellant estimates damages to the class for the period since 1973 to be in the range of $8,000,000 (based on 5% of gross revenues) or an average of about $500 per member of the class.

** The inappropriateness of burdening landlords here contrasts with the rent control cases. (Supra at 69-72). The constitutionality of rent control may be justified in part on the ground that a severe market dislocation enables landlords, because of their superior bargaining position, to charge unconscionably high rents based on the "hold-out" value of an empty apartment. The rent control laws protect the weaker party to the

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Additionally, Section 828 imposes on landlords not merely the burden of loss of prospective income but also direct costs attributable, for example, to time devoted to supervision of installation and maintenance workers, and prospective liability to third persons for injury suffered by reason of the installations. (Supra at 39-45).

3. Alternatives

Alternatives to the confiscatory means adopted in Section 828 are readily available to accomplish the ostensible objectives of Section 828. One clear-cut alternative for Teleprompter is condemnation of easements. This choice

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bargain. Here, although a property lying along the projected route of a cable may have a "hold-out" value, the economic, strength and bargaining power of the cable company (and even its political power since a statutory procedure consistent with the Constitution is also possible) remove the need for legislative protection which might be present in the case of tenants.

would merely result in passing on to the consumer one of the direct costs of providing service.

Another alternative is to proceed just as Teleprompter did prior to Section 828. Then, Teleprompter obtained licenses from willing owners at a fee--generally 5% of gross revenues. Where such licenses were unavailable and it was necessary to bypass a property, Teleprompter ran its cables under public streets or from adjacent properties of consenting owners.* Teleprompter's remonstration that such procedures are

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* Teleprompter's installation plans (JtA166-71) illustrate various means of avoiding particular buildings. For example, JtA167 shows that no installation was made on 1704 Second Avenue; other buildings on the block were reached by "messenger" lines (the wavy lines across yard spaces, representing aerial lines), and by a street crossing out of 316 East 89th Street. JtA166 shows numerous installations through yards and the avoidance of 309-315 West 83rd Street and 332 West 84th Street. (See generally JtA 142-43, 147-50; Gruen Aff. 4/28/78 pp. 4-5).

uneconomical (a conclusory assertion supported by no proof) is difficult to credit given the existence in New York of understreet conduits for gas, electric, telephone, steam, water and sewer lines to which Teleprompter could presumably gain access.*

There is nothing in the record to suggest that the cost of compensating owners could not be passed on to subscribers without adverse effect on subscription sales. Indeed, the record strongly suggests the contrary. A long-term pattern of rapid rate increases

* There are other cable television companies in New York State which do utilize the conduits of other utilities to carry CATV cables and other equipment. See Peoples' Cable Corp. v. City of Rochester, 70 Misc. 2d 763, 334 N.Y.S.2d 972 (Sup. Ct. Monroe Co. 1972), aff'd, 41 App. Div. 2d 585, 340 N.Y.S.2d 883 (4th Dep't 1973). The New York City system of under-the-street ducts (which Teleprompter utilizes on major thoroughfares) is described in New York State Cable Television Ass'n v. New York State Public Service Comm'n, 438 N.Y.S.2d 974 (Sup. Ct. Albany Co. 1981).

has evidently not appreciably affected demand.*

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* Teleprompter represented to Hughes Aircraft Company in January 1977 that since 1973 its rates had gone up 67% (i.e., over 22% per year). (JtA77). As of March 1, 1974, the rates were increased from $6 to $9 per month. (Teleprompter 10-K for 1974, p. 7; Ex. L to Gruen Aff. 4/28/78). In 1973, Teleprompter Manhattan paid landlords approximately $120,000 (see Gruen Aff. 4/28/78 Exh. K pg. 2), indicating maximum gross revenues of $2,400,000. Since the base rate in 1973 was $72 per year, this would suggest that Teleprompter Manhattan had about 33,300 subscribers in 1973. Four years later, as of December 31, 1977, and after the substantial rate increases described above, Teleprompter Manhattan had 49,300 subscribers to its "basic" (i.e., non-pay TV) service. (Teleprompter 1977 Form 10-K filed with the Securities and Exchange Commission, page F-9; not in the record). With this record of 48% subscriber growth over four years notwithstanding rate increases totalling 67%, it appears unlikely that a pass-along of the usual 5% landlord fee to subscribers would suddenly elasticize what Teleprompter management has evidently previously judged to be a rather price-inelastic demand pattern. Teleprompter currently charges a basic rate of $11.75 per month for service in Manhattan (N. Y. Times, 11/8/81, Section 2, p. 1, col. 1); a 5% increase would bring the charge to $12.34 per month--hardly the kind of difference one would expect to make or break a decision to subscribe.

In short, the burdens placed upon landlords by Section 828 are unnecessary and far outweigh any slight benefit to society as a whole. Thus, even viewed as an exercise of the police power, the statute is excessive and constitutes a taking which, because no compensation is provided for, violates the Constitution.

CONCLUSION

Whether analyzed as a per se taking or as an excessive exercise of the police power, Section 828 violates the taking and due process clauses. The decision of the Court of Appeals should be reversed and the case remanded for assessment of damages.

Dated: New York, New York
December 11, 1981

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Appellee's Brief

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Docket No. 81-244

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

JEAN LORETTO, on behalf of herself and all others similarly situated,

Appellant,

v.

TELEPROMPTER MANHATTAN CATV CORP., TELEPROMPTER CORPORATION and CITY OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK,

BRIEF OF MUNICIPAL APPELLEE

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Question Presented

Is a state statute which (a) prohibits landlords from interfering with the installation of cable television components on their property or from exacting compensation from tenants or cable television companies for permitting such installation, and (b) which requires the cable companies to bear the entire cost of installing, operating and removing such components, and to indemnify the landlord for any damage caused by such installation, operation or removal, a valid exercise of the State's police power?

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IN THE
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ON APPEAL FROM THE COURT OF APPEALS
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BRIEF OF MUNICIPAL APPELLEE

Opinions Below
New York Court of Appeals
53 NY 2d 124 (1981)

The Court found that the purpose of the statute, encouraging the rapid development and maximum penetration of cable television, "is a legitimate purpose for use of the police power" and that the challenged provisions "are reasonably and substantially related to that

purpose." The Court further held that the State was not acting to further any governmental program but instead sought "to adjust the benefits and burdens of economic life to promote the common good"; that the economic impact of the statute was insufficient to invalidate it since plaintiff was not deprived of a fair return from her property, and that her reasonable investment backed expectations were not frustrated.

Appellate Division
73 A.D. 2d 849

The Appellate Division, First Department unanimously affirmed without opinion.

Supreme Court, Special Term
98 Misc. 2d 944

At Special Term, the Court granted separate motions for summary judgment by the Teleprompter defendants and by the City of New York. The Court declared that Executive Law §828(1)(b) "represents a reasonable and, therefore, justifiable exercise of the police power of the State." The Court noted that plaintiff did not contend that the attachment of Teleprompter's components had an adverse economic impact on the income-producing potential of her rental premises.

Statement Of The Case

The Statement of the Case is presented in the brief of the Teleprompter Defendants, and will not be repeated here.

Summary Of Argument

In cases involving the distinction between compensable taking and valid police power regulation, the question of whether a taking has occurred is determined by reference to three factors: the character of the governmental action, its economic impact and its interference with reasonable investment backed expectations. A taking is more readily found when the governmental act can be characterized as a physical invasion of private property by government, than when the government is

attempting to balance the benefits and burdens of economic life to promote the common good. In the latter situation, a taking will be found only when the economic impact and interference with investment backed expectations is severe; even when the act can be characterized as a physical invasion by government, the economic impact must be "substantial" before compensation is required.

Appellant argues that every government action authorizing a "physical invasion", no matter how insubstantial, of private property by a third party constitutes a per se taking, obviating further inquiry into the three factors referred to above. Yet this Court has consistently applied these factors in eminent domain cases even when the government action was

described by the Court as a "physical invasion". Recent physical invasion cases have been decided by resolving the issues of economic impact and interference with investment backed expectations.

In the instant case the appellant has demonstrated no more than minimal economic impact on her property, and has not shown any interference with her investment backed expectations. The placing of a half-inch wire and two four-inch cubes on unused portions of a roof constitute at best a negligible intrusion, especially in contrast to regulations of far more serious consequence that have been sustained by this Court. Here the economic viability of appellant's property remain fully intact, and the

primary purpose of her property, rental of apartment units, is wholly unaffected.

Moreover, the challenged statute is valid when measured against police power standards as well. It is designed to promote the public welfare, by insuring the continued and orderly growth of the cable industry. It is reasonably calculated to achieve its desired goal. And it constitutes an insignificant interference with appellant's property.

ARGUMENT

THE CHALLENGED STATUTE IS AN EFFORT TO BALANCE COMPETING ECONOMIC INTERESTS, RATHER THAN AN APPROPRIATION BY GOVERNMENT OF PRIVATE PROPERTY FOR GOVERNMENTAL USE. SINCE THERE IS NO SHOWING OF SUBSTANTIAL ECONOMIC IMPACT ON APPELLANT OR FRUSTRATION OF HER REASONABLE INVESTMENT BACKED EXPECTATIONS, THE STATUTE IS A VALID EXERCISE OF THE STATE'S POLICE POWER.

(1)

In recent cases involving the distinction between compensable taking and valid police power regulation, this Court has repeatedly acknowledged that no "set formula" exists for determining whether a compensable taking has occurred. See, for example, Kaisar Aetna v. United States, 444 U.S. 164 (1979); Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978), reh. denied, 439 U.S. 883 (1978); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); United States v. Central Eureka Mining Co., 357 U.S. 155 (1958). In weighing

the validity of governmental interference with private property rights, the Court has accorded critical significance to three factors: the character of the governmental action, its economic impact and its inferference with reasonable investment backed expectations. PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980); Kaisar Aetna v. United States, supra; Penn Central Transportation Co. v. New York City, supra.

In discussing the first of these factors, the Court in Penn Central, supra, noted that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, e.g., United States v. Causby, 328 U.S. 256 (1946), [involving direct overflights above the claimant's land by military aircraft that destroyed its present use as a chicken farm] than when interference arises from some public

program adjusting the benefits and burdens of economic life to promote the common good". Continuing, the Court declared that "government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute 'takings'". Penn Central, supra, 438 U.S. at 128. The Court then cited a number of cases as illustrative of this principle, all of which involved intrusions on private property by the government in furtherance of governmental functions, including Causby, supra, and Portsmouth Co. v. United States, 260 U.S. 327 (1922) (holding that the repeated firing of guns by the military over the claimant's land constituted a taking). In upholding the application of New York City's Landmark's Law to Grand Central Terminal, the Penn Central Court concluded that since there was "no...appropriation of property by

government for its own uses" (438 U.S. at 135) but rather, a restriction on the exploitation of property that did not preclude a reasonable return nor interfere with Penn Central's primary expectation concerning use of the property, there was no right to "just compensation". 438 U.S. at 136.

The degree of economic impact or interference with investment backed expectations that must occur before a compensable taking will be found varies with the character of the challenged governmental action. In cases like Penn Central, where the government is "adjusting the benefits and burdens of economic life to promote the common good" (438 U.S. at 124), the economic impact must be quite severe to warrant a finding of a taking. For example, the appellant in Penn Central had been deprived of the right to earn millions of dollars in potential rentals from a proposed tower above Grand Central Terminal. Nevertheless, the Court

found that, since Penn Central's "primary expectation concerning the use of the parcel" (438 U.S. at 136) was not frustrated, and since Penn Central could continue to earn a reasonable return on its investment, there was no taking.

This Court has consistently upheld the validity of regulations having a far more severe economic impact than that presented here. See, for example, Miller v. Schoene, 276 U.S. 272 (1978), where the Court upheld state action in ordering the plaintiff to cut down his red cedar trees because they were incompatible with nearby apple trees; United States v. Central Eureka Mining Co., supra, upholding a government order closing gold mines so that miners would be available for other work; Goldblatt v. Hempstead, supra, upholding a municipal ordinance banning excavations below the water table, which prevented plaintiff from continuing a sand and gravel business that had been operated for many years; Hadacheck v.

Sebastion, 239 U.S. 394 (1915), upholding a law preventing plaintiff from continuing his brickyard business on the ground that it was inconsistent with neighboring uses.

Where the character of the government action is such that a taking may be more readily found, as where the government has physically invaded property in furtherance of a governmental function, a less severe showing of economic harm will generally suffice; but the damage must still be substantal. For example, in United States v. Causby, supra, the Court held that "flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." 328 U.S. at 266. The Court in Causby (328 U.S. at 266) relied upon United States v. Cress, 243 U.S. 316, 328 (1916), which involved flooding by government of private property, where the Court

noted that "it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking" (emphasis supplied). Causby was later discussed in Griggs v. Allegheny County, 369 U.S. 84, 88 (1961), where the Court stated that Causby "held that the United States by low flights of its military planes over a chicken farm made the property unusable for that purpose and that therefore there had been a 'taking'..." (emphasis supplied).

(2)

The crux of the appellant's argument is that every government action authorizing a "physical invasion" -- no matter how insubstantial -- of private property by a third party constitutes a per se taking so as to entitle the property owner to just compensation; and that further inquiry into economic impact or investment backed expectations is unnecessary.

This simplistic formula represents a clear departure from recent decisions of this Court.

As we noted supra, p. 7, the Court has repeatedly emphasized that each case must turn on "ad hoc, factual inquiries" conducted with respect to the unique circumstances of the case. Hodel v. Virginia Surface Mining and Reclamation Ass'n, ___ U.S. ___, 101 S. Ct. 2352 (1981); Kaisar Aetna v. United States, supra, 444 U.S. at 175.

Appellant cites no authority whatsoever for his contention that the analytical framework espoused by the Court in Penn Central and subsequent cases must be abandoned when physical invasion is alleged. To the contrary, both Kaisar Aetna and PruneYard were described by the Court as "physical invasion" cases. In both cases, the Court's decision was based on considerations of economic

impact and interference with investment backed expectations.

In Kaisar Aetna, the owner of what had been a private pond had invested "substantial amounts of money "(444 U.S. at 176) to convert the pond into a marina, which was to be open only to fee paying members. The government then sought to rely on the navigational servitude doctrine in order to compel the owner to open the facility to the public. The Court, terming the imposition of navigational servitude "an actual physical invasion of the privately owned marina" (444 U.S. at 150), held that the government's action required an exercise of eminent domain.

PruneYard involved an appeal from a ruling of the California Supreme Court requiring a shopping center to provide access to high school students who wished to set up a table to provide information, distribute pamphlets and solicit signatures in opposition to a United

Nations resolution condemning Zionism.* Like the appellant here, PruneYard argued that the right to exclude others from privately owned property was essential to the Fifth Amendment guarantee against the taking of property without just compensation. The Court agreed that "one of the essential sticks in the bundle of property rights is the right to exclude others" (447 U.S. at 82), but noted that "not every destruction or injury to property by governmental action has been held to be a taking

*While PruneYard involved an issue of free speech, it is indistinguishable from the case at bar. The PruneYard Court recognized that the appellees had no federal constitutional right to solicit signatures at a private shopping center (447 U.S. at 81), and treated the state constitutional provision, which it said went beyond the rights conferred by the First Amendment, as equivalent to a state statute for purposes of the appeal. 447 U.S. at 79. Thus, as in the case at bar, the Court was faced with deciding the validity of a state law authorizing a physical invasion of private property by individuals other than the government.

in the constitutional sense." 447 U.S. at 82. The Court then declared that the issue of whether a taking had occurred must be determined by reference to the factors applied in Penn Central and Kaisar Aetna, i.e., the character of the governmental action, its economic impact and its interference with reasonable investment backed expectations. The Court held that there was "nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center" (447 U.S. at 83), and hence, "the fact that [appellees] may have 'physically invaded' appellant's property cannot be viewed as determinative." 447 U.S. at 84.

The Court went on to distinguish the case before it from the situation in Kaisar Aetna:

> "Kaisar Aetna was a case in which the owners of a private pond had invested substantial amounts of money in dredging the pond, developing it into an exclusive marina, and building a surrounding marina community....
>
> "The Government's attempt to create a public right of access to the improved pond interfered with Kaisar Aetna's 'reasonable investment backed expectations.' We held that it went so far beyond ordinary regulation or improvement for navigation as to amount to a 'taking'." [citing Kaisar Aetna, 444 U.S. at 178]

447 U.S. at 84. The Court concluded that the PruneYard appellants "failed to demonstrate that the right to exclude others 'is so essential to the use or economic value of their property that the state authorized limitation of it amounted to a taking'". 447 U.S. at 84.

Appellant attempts to distinguish PruneYard on two grounds, both of which are without merit. First, she claims it falls within the holding of Marsh v. Alabama, 326 U.S. 501 (1946), which holds that where an owner dedicates his property to a use which serves the function of an urban civic center, and invites the public onto it, he cannot then restrict the exercise of free speech. However, appellant's argument ignores this Court's express declaration that in PruneYard, no free speech issue was implicated. See discussion supra, p. 16fn.

Secondly, appellant's argument that PruneYard involved transient entry, while the case at bar involves "permanent" occupation, is without merit. PruneYard recognizes that the right to exclude others encompasses the right to prevent other individuals from entering and

leaving one's private property at will. Surely such "transient" entries by individuals, are no less an invasion of private property than the placing of a half-inch cable and four inch cube directional tap on an otherwise unused portion of appellant's roof.* Moreover, "[n]othing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable." San Diego Gas & Electric Co. v. City of San

*The "character" of an invasion, as either transient or permanent, has never been a factor in determining whether a taking has occurred. For example, a taking may be found when the government has caused the flooding of private property, regardless of whether the flooding is permanent or intermittent. Pumpelly v. Green Bay Co., 80 U.S. 166 (1871); United States v. Cress, 243 U.S. 316 (1917).

Diego (dissenting opinion)* ___ U.S. ___, 101 S. Ct. 1287, 1296, 1306 (1981).

Moreover, the language from St. Louis v. Western Union Telegraph Co., 148 U.S. 92, 93-94 (1893), relied on by appellant at pp. 65-66 of her brief, concerning the difference between transient and permanent street use, in no way supports her contention. That discussion was addressed to the issue of whether a city has the right to charge a utility for the use of its streets. The Court was in no way suggesting that for purposes of eminent domain analysis, there is a distinction between permanent and intermittent occupation of private property.

*The majority opinion held that the lower court's decision was non-reviewable. The dissent disagreed, and addressed the merits of the appeal.

The notion that a physical invasion is not determinative of whether a taking has occurred can be found in numerous other cases. See, for example, Block v. Hirsch, 256 U.S. 135 (1921), upholding a rent control statute which prohibited landlords from evicting tenants after expiration of the lease provided the tenant continue paying rent at the level set in the lease. See also Jackman v. Rosenbaum Co., 263 Pa. 158 (1919), aff'd 260 U.S. 22 (1922), in which the Court declined to find a taking where the defendant, acting pursuant to Pennsylvania law, had determined to construct a party wall incorporating the plaintiff's wall and, when the wall was found unfit for that purpose, tore it down, causing the plaintiff to lose a season in theatrical bookings.

The appellant's per se argument contains other flaws as well. While this Court has often given great weight to the fact that an

act of government could be characterized as a "physical invasion", such cases invariably involve actions upon the subject property by the government itself. This Court has indicated that it would more readily find a taking has occurred under such circumstances. See, for example, Penn Central Transportation Co. v. New York City, supra, 438 U.S. at 124; United States v. Causby, supra, 328 U.S. at 264-5; YMCA v. United States, 395 U.S. 85, 92 (1969).

The rationale for drawing a distinction between invasion by government and invasion by private parties is obvious. Invasions by government generally involve the "acquisitions of resources to permit or facilitate uniquely public functions" (Penn Central, supra, 438 U.S. at 128) and are often compensable takings. Where, as here and in PruneYard, government regulation prevents an owner from excluding another from his property,

the regulation is more likely to arise "from some public program adjusting the benefits and burdens of economic life to promote the common good," (Penn Central, supra, 438 U.S. at 124) and hence not constitute a taking.

Moreover, not even every physical invasion of private property by government requires compensation. In YMCA v. United States, supra, the claimant sued the government for damages to its property when army troops occupied its building during a siege by rioters. In rejecting this claim, the Court held (395 U.S. at 92-93):

> "Ordinarily, of course, governmental occupation of private property deprives the private owner of his use of the property, and it is this deprivation for which the Constitution requires compensation. See, e.g., United States v. General Motors, 323 U.S. 373, 378 (1945). There are, however, unusual circumstances in which governmental occupation does not deprive the private owner of any use of his property."

The Court held that the government troops did not deprive the owners of any use of their building, and since the damage was caused by third parties, the government's involvement in the deprivation of claimant's property was not sufficiently direct and substantial as to require compensation.

Federal courts have repeatedly held that recovery for a taking may be had for physical invasion of private property by government only when the damage is substantial. See, e.g., Speir v. United States, 485 F. 2d 643, 646-647 (Ct. Cl, 1973) ("Although these helicopter flights at low altitudes were wrongful invasions into the airspace as to which the plaintiffs had a legally protected property interest, such flights did not amount to a taking of an avigation easement unless they interfered substantially with the use and enjoyment of the property"); R.J. Widen Co. v. United States, 357 F. 2d 988 (Ct. Cl., 1966)

involving the entry of government agents onto claimant's land during construction of a flood control project, and the destruction of a dam and headgates on claimant's property); Eyherabide v United States, 345 F. 2d 565 (Ct. Cl., 1965) (involving, inter alia, sporadic shelling of claimant's property by navy personnel). Where the economic consequences of a physical invasion by government are not substantial, a taking will not be found. Adamon Mutual Water Co. v. United States, 181 F. Supp. 658 (Ct. Cl., 1958).

(3)

Apart from having failed to demonstrate that the physical invasion of appellant's property was substantial, the appellant has not satisfied the other criteria in showing that the physical invasion had a substantial economic impact on her property and resulted in the frustration of her reasonable investment backed expectations. The economic

impact of having a half-inch wire strung across otherwise unoccupied space on the roof of an apartment building is insignificant, especially when contrasted with regulations of far more serious economic consequence that have been sustained by this Court. See, for example, Penn Central, supra, and cases cited at pp. 8-9, supra. Rather, this negligible intrusion constitutes at most a minimal interference with private property and is of no economic consequence.

Nor can plaintiff seriously claim frustration of her reasonable investment backed expectations. If the phrase is to have any meaning at all it must be interpreted to mean investment with a particular purpose or expectation in mind. It cannot, as appellant suggests (br., pp. 85-88) simply mean that a person who invests money expecting to earn a return cannot be deprived of incidental income which was not a significant factor in his

decision to invest. This Court in Penn Central rejected the contention that a claimant need merely show that he was denied the opportunity to exploit a property interest which he had previously believed was available for exploitation. The Court added (438 U.S. at 136):

> "Unlike the governmental acts in Goldblatt, Miller, Causby, Griggs, and Hadacheck, the New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel. More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a 'reasonable return' on its investment."

Similarly, in the case at bar, the economic viability of appellant's property remains fully intact. She has demonstrated no more than nominal damage to her property, and is in no way deprived of the economic benefits resulting from the intended use of her property, i.e., the rental of apartments to tenants. Indeed, the appellant is deprived of nothing, save the "right" to demand of tenants and cable companies unreasonable and unjustified fees for the right to deliver or receive cable service. This hardly constitutes an oppressive interference with reasonable investment backed expectations.

(4)

Neither St. Louis v. Western Union Telegraph Co., 148 U.S. 92 (1893), nor Western Union Telegraph Co. v. Pennsylvania Railroad Co., 195 U.S. 540 (1904), supports appellant's contention that a statute authorizing the placement of a half-inch wire and four inch

cubes on unused portions of an apartment building roof constitutes a per se taking. Both cases involved an 1866 federal statute giving telegraph companies the right to construct and operate their lines along any military or post road of the United States. However, the act did not provide that the companies could do so without paying compensation to owners on whose property poles were placed; and the Court held that there was no indication of Congressional intent to exempt the companies from their normal duty to pay for any private property they may use:

> "If it is ... simply a permissive statute, and nothing in it which implies that the permission to extend its lines along roads not built or owned by the United States carries with it any exemption from the ordinary burdens of taxation, it may also be affirmed that it carries with it no exemption from the ordinary burdens

> which may be cast upon those who would appropriate to their exclusive use any portion of the public highways."

St. Louis v. Western Union Telegraph Co., 148 U.S. at 102.

Even if these two decisions could be read to imply that the acts of the telegraph company require a taking in eminent domain, they would not be controlling here. This Court has repeatedly emphasized that every case where a "taking" is alleged requires an ad hoc factual analysis of the unique circumstances of the case. See discussion supra, pp. 7, 14. We submit that placing half-inch cables on unused portions of a roof presents a situation far different from placing telegraph poles conspicuously on private land. In any event, these cases were decided long before the doctrine espoused in Penn Central and prior cases evolved; and what may once have constituted an oppressive interference with

private property may now be justifiable under the police power.* As this Court noted in Euclid v. Ambler Co., 272 U.S. 365, 386-387 (1926):

> "Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for

*The federal statute at issue in St. Louis and Western Union was not a police power statute, but was an exercise of the federal government's power to regulate interstate commerce. Western Union Telegraph Co. v. Pennsylvania Railroad Co., 195 U.S. at 562.

> reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise."

(5)

Even where the physical invasion authorized by the challenged statute does not constitute a taking within the meaning of the eminent domain law, the legislation can still be invalid if shown to be an improper exercise of the police power. The validity of a statute which interferes with the rights of an individual is determined by a balancing of three elements: whether the general welfare requires such interference,

whether the means are reasonably necessary to achieve the purpose of the statute, and whether the means are unduly oppressive upon individuals. Goldblatt v. Hempstead, supra; Lawton v. Steele, 152 U.S. 133, 137 (1894).

The first requirement, that the statute be designed to promote the public welfare, is unquestionably met by Executive Law §828(1)(b). There can be no doubt that legislation which tends to ensure the public's access to cable television effectively promotes the public welfare. Indeed, television has become one of the major sources of information, news and political communication, as well as entertainment, for the residents of the City.

This Court recognized the importance of government supervision of CATV, as well as over-the-air broadcasting, when it held that the Federal Communications Commission has jurisdiction over CATV

systems and may regulate their activities. See United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

Congress has shown its concern for the development of educational uses of television by establishing a non-profit Corporation for Public Broadcasting. In a statutory declaration of policy, Congress found that:

> (1) it is the public interest to encourage the growth and development of public radio and television broadcasting, including the use of such media for instructional, educational, and cultural purposes; . . .
>
> (3) expansion and development of public telecommunications and of diversity of its programming depend on freedom, imagination, and initiative on both the local and national levels; . . .

> (5) it furthers the general welfare to encourage public telecommunications services which will be responsive to the interests of people both in particular localities and throughout the United States, and which will constitute an expression of diversity and excellence.

47 U.S.C.A. §396 (Public Broadcasting Act of 1967).

As appellant herself points out (br., p. 104), it was necessary, prior to the enactment of the challenged statute, for Teleprompter to bypass non-consenting owners and run its cables under public streets and from nearby properties. In light of the rapid growth of the cable industry this method would surely have the effect of transforming urban streets into a grotesque landscape of perpetual street openings and cable television poles haphazardly placed in the streets. This

Court has long recognized that it is within the police power of the state to protect residents from "the ill effects of urbanization." Agins v. Tiburon, 447 U.S. 255, 261 (1980). See also Penn Central, supra, at 129; Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974); City of Euclid v. Ambler, supra, 272 U.S. at 394-395 (1926).

That the second requirement is met, i.e., that there exists a nexus between the purpose of the statute and the means chosen to achieve that purpose, is obvious. If landlords are free to impede delivery of cable service to their tenants, either by refusing access or by charging excessive and unjustified fees, the growth of cable television will be severely hampered. Only by the prohibition of such conduct by landlords can the tenants' access be ensured.

The third requirement, that the interference not be unduly oppressive, is determined by reference to how substantially the interference affects the economic viability of the particular parcel. Goldblatt v Hempstead, supra, 369 U.S. at 594. The discussion supra, pp. 27-30, clearly demonstrate that the interference with appellant's property is minimal, and that she has clearly fallen far short of meeting the standard for a constitutional taking.

Conclusion

The order of the New York Court of Appeals should be affirmed.

January 18, 1982

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Appellee's Brief

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No. 81-244

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JEAN LORETTO, on behalf of herself and all others similarly situated,
Appellant,

v.

TELEPROMPTER MANHATTAN CATV CORP., TELEPROMPTER CORPORATION and CITY OF NEW YORK,
Appellees.

On Appeal from the New York Court of Appeals

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QUESTIONS PRESENTED

1. Whether the State of New York may, under its powers (1) to define and regulate landlord-tenant relations, and (2) to foster statewide educational and communications interests, protect the right of tenants to receive cable television services against interference from landlords.

2. Whether New York Executive Law § 828, which prevents landlords from interfering with the installation of cable television facilities, can be held to constitute a "taking" without reference to the insubstantiality of the property rights which the landlords claim to have been taken, or to the property and other interests of tenants.

3. Whether the determination of New York's highest court that New York Executive Law § 828 represents a valid exercise of legislative discretion violates the due process clauses of the Federal Constitution.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-244

JEAN LORETTO, on behalf of herself and all others similarly situated,

Appellant,

v.

TELEPROMPTER MANHATTAN CATV CORP., TELEPROMPTER CORPORATION and CITY OF NEW YORK,

Appellees.

On Appeal from the New York Court of Appeals

BRIEF FOR THE TELEPROMPTER APPELLEES

OPINIONS BELOW

The Opinion of the New York Court of Appeals is reported at 53 N.Y.2d 124, 423 N.E.2d 320, 440 N.Y.S.2d 843, and is set out in the Jurisdictional Statement at pp. A1-A99. The Decision of the New York County Supreme Court is reported at 98 Misc. 2d 944, 415 N.Y.S.2d 180, and is set out in the Jurisdictional Statement at pp. A121-A125.

JURISDICTION

The judgment below was entered on May 7, 1981 (J.S. A102). The Notice of Appeal was received by the New York

Court of Appeals on July 27, 1981[1] (J.S. 156). The Jurisdictional Statement was filed on August 4, 1981.

The case involves the constitutional validity of § 828 of the New York Executive Law, and the court below upheld the statute's validity. This Court noted probable jurisdiction on October 19, 1981.

The jurisdiction of this Court rests on 28 U.S.C. § 1257(2).

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra* pp. 1a-3a.

STATEMENT

Teleprompter Manhattan CATV Corporation (hereinafter "Teleprompter") is a cable television company which provides service to subscribers on the northern half of Manhattan Island.[2] In 1968, Teleprompter entered into an agreement with Sharie Wald, who then owned an apartment building at 303 West 105th Street in Manhattan. (J.S. A13-A14.) Pursuant to

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[1] The Notice of Appeal, dated July 21, 1981, was filed on July 22, 1981, in the Supreme Court of New York for New York County (J.S. 156), contrary to the provisions of Rule 10.3 of this Court's Rules. Inquiry made by the Clerk of this Court to the Clerk of the New York Court of Appeals has disclosed that a copy of the notice was sent by the Clerk of the Supreme Court to the Clerk of the Court of Appeals, and was received by the latter on July 27, 1981. Since a copy was received by the Court of Appeals within the ninety-day period, no question is raised as to the jurisdiction of this Court.

[2] Teleprompter Manhattan CATV Corporation is one of three parties appearing as appellees. Appellee Teleprompter Corporation was the parent corporation of Teleprompter Manhattan CATV Corporation. The latter corporation has now ceased to exist, and is a division of Teleprompter Corporation. The list of parent companies, subsidiaries and affiliates, required by Rule 28.1 of this Court's Rules, revised to date, is printed as Appendix B, *infra*, pp. 4a-5a.

Appellee City of New York has franchising authority for the provision of cable television services in the City, and received permission from the New York County Supreme Court to intervene in this action. (J.S. A126-A128.)

this agreement (which has now expired), Teleprompter connected the building to its cable television system. (J.S. A14.) This involved the attachment of about 30 feet of coaxial cable, about one-half inch in diameter, on the roof and behind the parapet in the front and rear of the building. (J.S. A14.) The installation on the roof also included two metal boxes known as "directional taps" of approximately 4″×4″×4″ on the front and rear of the roof, in order to facilitate the providing of service to particular tenants. (J.S. A14.)

In 1971, appellant, a real estate broker, purchased the premises at 303 West 105th Street. (J.S. A14-A15.) Appellant inspected the roof several times before purchasing the building, and several times shortly thereafter, but did not notice the cables that had been installed. (J.S. A15.) Approximately two years later, Teleprompter connected lines which provided cable television service to two of appellant's tenants. (J.S. A15.) Appellant now claims that Teleprompter's continuing maintenance of cables and associated connections constitutes a trespass. (J.S. A3.) She claims further that New York Executive Law § 828, which protects the tenants' right to receive cable television services, is unconstitutional. (J.S. A4.)

The text of Executive Law § 828 is reproduced in the Appendix at pp. 2a-3a, *infra*. Subdivision 1(a) of § 828 prohibits landlords from interfering with the installation of cable television facilities on their property. Subdivision 1(a) also prohibits landlords from requiring tenants to pay for the right to receive cable television services. The subdivision does, however, permit landlords to require that cable television facilities are installed in such a manner as will "protect the safety, functioning and appearance of the premises," to require the cable television company or the tenant to bear the entire cost of installing the facilities, and to require cable television companies to indemnify landlords for any damages caused by the installation or maintenance of the facilities.

In addition, where a tenant in a landlord's building is receiving cable television service, subdivision 1(b) of § 828 permits landlords to receive compensation from cable television companies in amounts determined by regulation of the New

York Commission on Cable Television. Currently, based on findings by the Commission that landlords usually do not incur losses when cable television services are made available to tenants, the Commission's regulations generally entitle landlords to compensation of one dollar when cable television facilities are installed for the benefit of their tenants. The regulations do, however, permit a landlord who believes that he has suffered actual loss in excess of this amount to apply to the Commission for an additional award. (J.A. 44-69.)

Proceedings Below

This action was commenced in February 1976, in the Supreme Court for New York County. Appellant brought the action as a class action on behalf of herself and other landlords similarly situated, but, upon a consideration of the relative merits of the claims and defenses in the case, the court required appellant to pay all costs of providing notice to the class. (J.S. A138-A147.)[3] After pre-trial discovery, both parties moved for summary judgment. The court granted summary judgment for Teleprompter, stating that "the obvious public advantage sought to be served by the legislation . . . greatly outweighs the insignificant nature of the physical use of property permitted by the statute." (J.S. A124.) The court stated that § 828 represents "a reasonable, and, therefore, justifiable exercise of the police power of the State. . . ." (J.S. A123-A124.) The Appellate Division, First Department, affirmed unanimously without opinion. (J.S. A110-A111.)

The New York Court of Appeals affirmed. The court addressed the question whether, in enacting § 828, the Legislature had intended to provide protection to the installation of "crossovers"—installations in which a cable is attached first to one building, and extended from there to an adjoining or

[3] The parties agreed to postpone notification of the class pending the outcome of the parties' cross-motions for summary judgment which are the basis for the judgment currently before this Court. (J.S. A6 n.5.)

adjacent building.[4] The court held that § 828 protects the installation of cross-overs. (J.S. A26-A37.) The court held, however, that § 828 entitles landlords to receive compensation only where service is provided to their tenants. (J.S. A36.) These constructions of the New York law by the New York court are of course binding here, and no question is now raised with respect to them.

The court then rejected appellant's contention that § 828 works a compensable taking. The court noted that appellant "makes no claim that she is not receiving a fair return from the property," but rather that her complaint is simply "that an area of the building for which she does not claim to have any other use may not be used for the benefit of her tenants because without the statute she would be able to obtain a fee from the CATV company, payable in the last analysis by the tenant. . . ." (J.S. A57.) The court said that "the State may proscribe a trespass action by landlords generally against a cable TV company which places a cable and other fixtures on the roof of any landlord's building, in order to protect the right of the tenants of rental property, who will ultimately have to pay any charge a landlord is permitted to collect from the cable TV company, to obtain cable TV service in their respective apartments." (J.S. A69.) The court stated that the "bases upon which the Legislature may [enact legislation such as § 828] are its power to regulate landlord-tenant relationships and its power to encourage development of an educational and communications medium." (J.S. A69.) The court stated also that under § 828, "the State takes nothing for itself as entrepreneur," and that "the physical invasion of the landlord's property by the attachment of [cable] facilities [did not] invalidate

[4] The decision of the Court of Appeals defines cross-overs as follows:

> A cross-over occurs when (1) the line servicing the tenants in a particular building is extended to adjacent or adjoining buildings; (2) an amplifier which is placed on a building is used to amplify signals to tenants in that building and in a neighboring building or buildings, and (3) a line is placed on a building, none of the tenants of which are provided CATV service, for the purpose of providing service to an adjoining or adjacent building.

J.S. A8-A9 n.6.

the Legislative exercise of the police power, in view of the minimal nature of the invasion and the absence of any reasonable expectation on the part of the landlord that the space thus utilized (or invaded) would ever be income productive." (J.S. A69, A72-A73.)

In a concurring opinion (J.S. A73-A76), Judge Gabrielli disagreed with the opinion of the majority that a taking had not occurred, but held that the case could be disposed of on the ground that the procedures available to landlords for obtaining compensation satisfied the requirements of the Fifth Amendment. Judge Gabrielli stated that under those procedures, "it is obvious that a landlord who actually incurs damage to his property or is restricted in the use to which he might put that property will receive compensation commensurate with the greater injury." (J.S. A75.) In a dissenting opinion, Chief Judge Cooke disagreed with both the majority's holding that § 828 is valid under the police power, and with Judge Gabrielli's view that the procedures providing for compensation satisfy constitutional requirements. (J.S. A76-A99.)

SUMMARY OF ARGUMENT

I.

This case involves a conventional regulation of the relationship between landlord and tenant. Executive Law § 828 prohibits landlords from preventing tenants from receiving a service which has, in recent years, become widely available to persons throughout the country. By protecting a tenant's right to receive these services, the Legislature performs the same function which it performs when it guarantees tenants the right to receive telephone service, electric service, and water from a public supply.

Appellant claims that § 828 "takes" from the landlord the few square inches on the exterior of a building to which cable and associated hardware must be attached. However, this argument takes an archaic view of a residential tenancy as a mere cession of the area within the four walls of a tenant's

apartment. This view is a remnant of the feudal concept of a leasehold as a mere cession of land. Today, courts recognize that tenants have rights in many common areas of multi-unit residences. During the term of the tenancy, these common areas are as much the "property" of the tenant as of the landlord, and § 828 works no departure from firmly established law in guaranteeing the tenant access to those areas of a building to which cable television equipment must be attached.

The state's well-established power to foster communications and educational interests further supports the Legislature's actions in determining that landlords must permit access to cable services. The legislative history, as cited by New York's highest court, describes these interests in detail. The Legislature has determined that cable communications are likely to enhance individuals' abilities to participate in society, both culturally and politically, and in protecting tenants' access to this medium the Legislature has acted within its long-recognized role of promoting the public welfare.

The protection which § 828 affords to "cross-overs" (i.e., cable installations on buildings where no tenant is yet receiving service) does not change the character of the legislation. Legislatures often require persons constructing buildings or otherwise developing property to provide facilities for future occupants. This point is illustrated by the fact that § 828 protects the installation of cables only on *landlords'* buildings —*i.e.*, buildings which the owner has chosen to devote to rental purposes, and in which tenants may be expected to seek cable television service as the medium becomes increasingly well-established.

II.

Even if § 828 is viewed as restricting a landlord's common-law property rights, this does not mean that the section works a compensable taking. First, § 828 effects, at most, a limited legislative adjustment of the boundaries of the landlords' property rights. This Court has long recognized the legislative function of making such adjustments. Second, § 828 does not

authorize a taking in the usual sense, where the public authority acquires property for use in a public improvement, regardless of the use to which the owner has devoted the property. Rather, § 828 authorizes cable hook-ups only on landlords' buildings, and, like many other statutes, defines a responsibility which a landlord must accept incident to the operation of rental premises. In cases involving similar use-dependent obligations, this Court has applied a pragmatic balancing test in determining whether compensable takings have occurred. Under any application of a pragmatic balancing test, § 828 does not rise to the level of a compensable taking.

For example, in a number of cases, this Court has upheld rights to conduct labor organizing activities on the premises of employers, over the employers' objections. In the labor cases, as here, landowners were obligated to allow physical intrusions on their property, as a result of the use to which the owners had chosen to devote their land. In each of the labor cases, the Court decided the question whether a taking had occurred on the basis of a balancing test under which the minimal intrusion here is well within permissible limits.

This case also resembles the recent case of *Kaiser Aetna* v. *United States*, 444 U.S. 164, in which the government claimed that developers who had constructed a navigable yacht basin on their property were required to allow public access to the development. The Court determined that a compensable taking had occurred, but only on the basis of a close examination of the practical effect of the governmental action, and the degree to which it interfered with reasonable investment-backed expectations. In *Kaiser Aetna*, the Court determined that the restriction on property rights which the government sought to impose was severe, and that the developers' expectations that the yacht basin would be private not only were reasonable but had been based in part on actions of government representatives. In the current case, the practical impact on landlords' property of allowing cable television services to be provided is *de minimis*, and New York's highest court has determined, upon examination of the legislative record, that the landlord's interest in charging tenants additional fees for the right to

receive cable services is not sufficiently pervasive to invalidate the legislative determination.

This case also is similar to the recent case of *PruneYard Shopping Center* v. *Robins,* 447 U.S. 74, in which this Court addressed the question whether a state may require the owner of property which has been devoted to use as a shopping center to allow persons peacefully to distribute literature and circulate a petition on shopping center property. The Court held in *PruneYard* that in view of the limited degree to which the state's actions had interfered with the owner's property rights, the actions had not worked a compensable taking. Here, allowing tenants to receive cable television services will not "unreasonably impair the value or use" of the landlord's property, any more than the state's actions in *PruneYard* had interfered with the value or use of the shopping center. Indeed, here, the availability of cable television services will enhance the use to which landlords have committed their property. In addition, just as the California Supreme Court in *PruneYard* gave the shopping center owner authority to impose reasonable time, place and manner restrictions on the use of his property, Executive Law § 828 allows a landlord to safeguard his property by exercising supervision over the manner in which cable television facilities are installed and maintained.

III.

Appellant argues that § 828 does not achieve a permissible balance between the interests which the Legislature sought to protect and the interests of landlords. However, the Legislature addressed the interests of the various parties and made a decision which was permissible within the limits of due process.

The interests which the Legislature sought to protect have already been described, and the promotion of these interests is well within the purview of a state legislature. Moreover, the danger of landlord interference which the Legislature sought to address was not speculative. On the contrary, the legislative history indicates that landlord interference posed a significant problem prior to the enactment of § 828.

Appellant's unhappiness with the Legislature's balancing process cannot support overturning the Legislature's judgment. As the decision of the New York Court of Appeals concludes, the Legislature addressed the claims to financial benefit which the landlord asserts in this case, and determined upon consideration that they were not worthy of legislative protection. Such determinations are entailed in all economic legislation, and the fact that such an allocation exists here should not serve as a reason to invalidate § 828.

ARGUMENT

I.

THIS CASE IS NOT A CLASS ACTION. THE ONLY FACTS BEFORE THIS COURT ARE THOSE RELATING TO MRS. LORETTO.

The Complaint filed in the Supreme Court of New York for New York County in this case (J.A. 5-20) contained allegations to support "class action status" (¶ 5, J.A. 7-9), and sought relief for the "plaintiff and the members of the class represented by plaintiff." (J.A. 19.) The record filed in the New York Court of Appeals[5] shows that on March 21, 1977, Justice Gellinoff of the Supreme Court for New York County entered an order certifying the case as a class action, with certain conditions.[6] These included a provision that the cost of notifying members of the class should be borne by the plaintiff (now the appellant). Thereafter, on December 6, 1977, a stipulation was entered into by the counsel for the parties. (Record in New York Court of Appeals, A65-A69.) This recited that "the parties deem it appropriate to defer notice to the class during the pendency of" motions for summary judgment, and consented to the amendment of the class action order so as to remove the requirement that members of the class be notified prior to consideration of the motions for summary

[5] A copy of this record (the Appellants' Appendix in the New York Court of Appeals) has been filed with the Clerk of this Court.

[6] The definition of the class was modified by an order of Justice Gellinoff dated July 6, 1977. (Record in the New York Court of Appeals, A27-A28.)

judgment.[7] Accordingly, the court proceeded to consider the motions for summary judgment without any notification to members of the class.

In this situation, the only party actually before the court was the plaintiff, Mrs. Loretto, and the only issues before the court were the facts relating to Mrs. Loretto and her premises at 303 West 105th Street in New York City. It is impossible to tell the identity of any members of the class other than Mrs. Loretto, since no steps were taken by which they might be enabled to opt into or out of the proceedings. This is fundamental, since a class action judgment is *res judicata* with respect to members of the class who have opted in, and probably with respect to members of the class who have been notified and have not opted out.[8] The giving of some form of notice is a prerequisite to the binding effect of a judgment on any members of the class. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306. *See also Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 176, where this Court said: "The short answer to these arguments is that individual notice to identifiable class members is not a discretionary consideration to be waived in a particular case." Rule 23 of the Rules of Civil Procedure is not directly applicable in the New York State courts, but the requirement of some sort of notice is constitutional under the Fourteenth Amendment, as the *Mullane* case holds. Here, there has been no notice at all.

It is true that counsel for the appellees stipulated to the procedure followed; and we do not repudiate that stipulation. Nevertheless, the consequence of the stipulation is to make it inappropriate to treat this case as a class action, since the procedural basis for an effective class judgment is not present. At most, the stipulation operated to present "feigned" issues before the Supreme Court of New York with respect to facts involving members of the class other than Mrs. Loretto. *Cf. Swift & Co.* v. *Hocking Valley R.R.*, 243 U.S. 281.

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[7] The class action order was amended on May 15, 1978, to reflect the parties' stipulation. A copy of the amended class action order has been filed with the Clerk of this Court.

[8] *See* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (1)*, 81 Harv. L. Rev. 356, 397 (1967).

Moreover, and whatever the procedural basis may be in New York, the present record does not present any "case or controversy" as to members of the class other than Mrs. Loretto. This, too, presents a constitutional question under Article III of the United States Constitution, for this Court is constitutionally limited to the consideration of actual "cases or controversies," and may not give advisory opinions with respect to questions of law presented by persons who are not actual parties, including members of a class who have not been brought before the Court by proper procedures. Accordingly, in this brief, consideration will be focused on the facts presented in the case of the appellant, Mrs. Loretto.

II.

THIS CASE INVOLVES THE EXERCISE OF THE STATE'S INHERENT POWER TO REGULATE THE RELATIONSHIP BETWEEN LANDLORD AND TENANT, AND TO FOSTER COMMUNICATIONS AND EDUCATIONAL INTERESTS WITHIN ITS JURISDICTION

A. Under Modern Landlord-Tenant Law, the Residential Tenancy Is Not Only an Allocation of Specified Space, But Is Also a Contract for the Provision of Facilities and Services Appurtenant to the Demise Which, Like Other Economic Relationships, Is Subject to Regulation by the States.

Appellant argues that by protecting the tenant's right to receive cable television services, the state has "taken" from the landlord those areas of the building over which the cable must pass. This argument, however, treats the residential tenancy as a mere cession of a closely-confined portion of the landlord's premises. Whatever may have been the merits of this view in times past, it no longer reflects the present situation and law. Today, the residential tenancy is rightly viewed as an agreement between landlord and tenant, through which the landlord enters into a *relationship* with the tenant involving not only the allocation of space to the tenant, but also the availability of a package of related rights and services. Such a relationship is appropriately subject to regulation by the states, and such

regulation now routinely assures to tenants many rights in common areas of the landlord's premises which are much more extensive than the rights the tenant exercises in receiving cable television services.

The leasehold estate originated in feudal times as a device under which an owner of land could, without sacrificing the perquisites of fee simple ownership, transfer the use of a specifically defined tract of land to another who could cultivate it more productively. M. Partington, Landlord and Tenant 3-4 (1980). This agricultural origin led to a view of the conveyance of a leasehold estate as a transference of the bare right to occupy a plot of land, with no further duties owing from the landlord to the tenant. "[T]he common law lease primarily conveyed to the tenant an interest in land rather than a bundle of contract rights and remedies." R. Schoshinsky, American Law of Landlord and Tenant 116 (1980).

In claiming that § 828 works a taking of the landlord's property, the landlord in the current case applies the common-law conception of the tenancy, and in a narrow manner. Appellant contends that in granting the urban tenant the right to occupy an apartment, the landlord grants to the tenant a defined and confined interest, not in land, but rather in the space within the four walls of the tenant's apartment. If, in connection with his occupancy of the apartment, the tenant must make use of any other portions of the residential structure, the appellant's position is that the tenant must purchase this right separately from the landlord. According to this reasoning, if a tenant wishes to subscribe to cable television services, the tenant must make a separate arrangement with the landlord through which the tenant acquires rights in the few square inches of the exterior of the building which the cable and associated hardware must traverse. If a statute protects the tenant's right to use these areas, then, says appellant, a taking has occurred.

But courts have long abandoned the spatially confined concept of a tenancy. Rather, under the modern view, "[t]he general rule is that appurtenances reasonably essential to the enjoyment of demised premises pass as an incident to them

unless specially reserved." *Henry A. Fabrycky, Inc.* v. *NAD Realty Corp.*, 261 A.D. 268, 269, 25 N.Y.S.2d 347, 349 (2d Dept. 1941); *see generally* Annot., 24 A.L.R.2d 123, 126 (1952). The appurtenance rule protects a tenant's exercise of a wide spectrum of rights. For example, in *400 North Rush, Inc.* v. *D. J. Bielzoff Products Co.*, 347 Ill. App. 123, 127, 106 N.E.2d 208, 210 (1952), a landlord claimed that a tenant had committed a trespass by affixing a sign to the exterior wall of a building in which the tenant had rented commercial space. The court held for the tenant, stating that "the exterior walls of leased premises are part and parcel of the demise to the lessee ...." In the parallel case of *Rayhertz Amusement Corp.* v. *Fulton Inprovement Co.*, 124 N.J. Eq. 121, 200 A. 557 (1938), a tenant, who had leased a portion of a building for use as a theater, sought to enjoin the landlord from continuing to maintain a large sign on the roof of the premises. The Chancellor granted the injunction to the tenant, stating:

> The description of the demised premises as a matter of settled law included the outside walls and the roof of the theatre building, *since as a general rule everything which belongs to the demised premises or is used with, and appurtenant to, them, and which is reasonably essential to their enjoyment, passes as an incident to them, unless especially reserved.*

124 N.J. Eq. at 123, 200 A. at 558-59 (emphasis added). *Accord, Lambros Metals, Inc.* v. *Tannous*, 71 Ariz. 53, 223 P.2d 570 (1950) (holding that a tenant could erect a "conservative" sign on the exterior of a building in which the tenant leased commercial space); *see also Hall* v. *Irvin*, 78 A.D. 107, 79 N.Y.S. 614 (1st Dept. 1903) (tenant had right to use water closets, wash basins, elevator, hallways, stairs, and entryway, although these rights were not expressly mentioned in tenant's lease); *92 Liberty Street Corp.* v. *Dooney*, 116 N.Y.S.2d 44 (App. Term 1st Dept. 1952) (tenant had right to be listed on building's directory tablet). The appurtenances in these cases all involved the use of portions of the physical premises; and the areas involved were, during the term of the lease, as much the property of the tenant as of the landlord.

Moreover, by prohibiting landlords from interfering with the provision of cable services to tenants, § 828 protects a well-established right of tenants to do business with whom they wish. Users of cable services "act . . . as consumers, just as much when they watch television as when they decide where to live, what to purchase, and how they will spend their leisure time generally." *Regulation of Cable Television by the State of New York,* Report to the State Public Service Commission by Commissioner William K. Jones (1970) (hereafter cited as the Jones Report) at 185.[9] In the absence of § 828, landlords might be in a position to insist that tenants procure cable television services only from purveyors of the landlord's choice.[10] However, the courts have long protected tenants' rights to do business with persons of their choice. For example, in *Federal Waste Paper Corp.* v. *Garment Center Capital, Inc.,* 268 A.D. 230, 51 N.Y.S.2d 26 (1st Dept. 1944), *aff'd per curiam,* 294 N.Y. 714, 61 N.E.2d 451 (1945), the court rejected a landlord's attempt to allow only one waste removal company to provide service to tenants in the landlord's building. The court said of the landlord's claim:

> This amounts to a claim that the owner has the unrestricted right to select the tenants' visitors and trades people. If that follows from the mere fact of ownership, then it would seem the owner of an apartment house would have the right to select the laundress, grocer, butcher or milkman of his tenants .... We think the mere statement of such claim, based on ownership alone, without proof of any special restrictions, regulations or agreements, carries its own refutation.

268 A.D. at 234, 51 N.Y.S.2d at 30. Similarly, in *Eagle Spring Water Co.* v. *Webb & Knapp, Inc.,* 236 N.Y.S.2d 266 (Sup. Ct.

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[9] The Jones Report initially proposed the legislation which ultimately became Article 28 of the New York Executive Law, of which § 828 is a part. J.S. A33-A34.

[10] For example, landlords might insist that tenants receive services only from "land-based stations" from which landlords share a portion of the profits. *See amicus curiae* brief of National Satellite Cable Association *et al.,* at 37-38 and n.18.

N.Y. Co. 1962), the court overturned an attempt by a landlord to impose its choice of a supplier of bottled drinking water on tenants. The court said:

> The arbitrary choice of exclusive tradespeople to be used by tenants, and the interference with the lawful business activities of other tradespeople, solely for the purpose of economic advantage to the landlord and completely unrelated to the protection of any legitimate interest in the property, cannot be upheld as either reasonable or necessary but is rather an unwarranted use of property that unreasonably invades the legal rights of others and should not be countenanced . . . .
>
> * * *
>
> . . . [T]o impose such limitation on the free use of the leased premises some condition or covenant to that effect must be found in the lease, otherwise the dominion of the tenant is as absolute during the demised term as that of the owner previous to the demise.

236 N.Y.S.2d at 278-80.

In view of the modern inclusive concept of the tenancy, it is likely that tenants in New York State could successfully assert rights to receive cable television services even in the absence of a statute to this effect, and such a decision by the New York Court of Appeals as a matter of New York property law would not seem to raise a substantial federal question. However, the passage of § 828 by the New York Legislature makes such a decision unnecessary. All that must be decided here is whether the rights which the tenant enjoys under § 828 so far exceed the appropriate boundaries of a tenancy as to render § 828 unconstitutional as a taking of the landlord's property. The resolution of this question should present no serious difficulty, however, since the states regularly ensure tenants' rights in common areas of premises much more extensive than the areas involved in the receipt of cable television services.

Perhaps the earliest manifestation of the enactment of laws ensuring tenants' rights in common areas of structures was the

adoption of housing codes. These codes protect the tenant's expectation that in procuring housing, he will receive at least a minimal level of services. *See* Comment, *California's New Legislation on a Landlord's Duty to Repair,* 3 U. C. Davis L. Rev. 131, 138-39 (1971). Many provisions of housing codes require landlords to provide services involving areas outside the confines of the tenant's apartment. For example, the laws of New York State protect the tenant's right to receive water from a public supply, to have adequate lighting in entryways, to have access to mail delivery (usually through the provision of mail boxes, which are a permanent intrusion for the purpose of facilitating communication), and to maintain and operate an attendant service in the lobby. New York Multiple Dwelling Law §§ 75, 35, 57, 50-c (McKinney 1974). Similarly, New York Real Property Law § 233(f)(3)(b), in a provision closely analogous to § 828, protects the right of tenants in mobile home parks to use electrical and gas appliances, against interference from landlords.[11] Under appellant's view of the law, these provisions must be invalid, since they "take" from the landlord a portion of his dominion over common areas of the premises and "give" this dominion to the tenant. Nevertheless, the constitutionality of housing codes is well established. *See e.g., Queenside Hills Realty Co.* v. *Saxl,* 328 U.S. 80 (upholding provision of New York Multiple Dwelling Law requiring

[11] Section 233(f)(3)(b) reads as follows:

> No mobile home park owner or operator shall charge any mobile home tenant who chooses to install an electric or gas appliance in his mobile home an additional fee solely on the basis of such installation unless such installation is performed by the mobile home park owner or operator at the request of the mobile home tenant, nor shall the mobile home park owner or operator restrict the installation, service or maintenance of any such appliance, restrict the ingress or egress of repairmen to enter the mobile home park for the purpose of installation, service or maintenance of any such appliance, or restrict the making of any interior improvement in such mobile home, so long as such an installation or improvement is in compliance with applicable building codes and other provisions of law and further provided that adequate utilities are available for such installation or improvement.

installation of sprinkler systems in existing buildings—obviously, these occupy a portion of the landlord's space); *Health Department* v. *Rector of Trinity Church,* 145 N.Y. 32, 39 N.E. 833 (1895) (upholding early New York law requiring installation of water supply); *see also Louisville* v. *Thompson,* 339 S.W.2d 869 (Ky. 1960); *State* v. *Schaffel,* 4 Conn. Cir. Ct. 234, 234-43, 229 A.2d 552, 552-59 (1960).

The recent establishment in a large number of jurisdictions, by decisional law or statute, of implied warranties of habitability in rentals of residential premises further indicates the extent to which areas of multiple dwellings outside the confines of individual apartments have become subject to regulation. The warranty of habitability provides that where a landlord lets a residence to a tenant, the landlord must maintain the services necessary to keep the premises in habitable condition. *See, e.g., Javins* v. *First National Realty Corp.,* 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied,* 440 U.S. 925; *Green* v. *Superior Court,* 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); *Jack Spring, Inc.* v. *Little,* 50 Ill. 2d 351, 280 N.E.2d 208 (1972); *Mease* v. *Fox,* 200 N.W.2d 791 (Iowa 1972); *see also* R. Schoshinsky, *supra,* at 150 n.73 (citing statutes of 34 states which have adopted the implied warranty of habitability). A recent leading case adopting the implied warranty of habitability noted the inapplicability of feudal notions in determining the boundaries of the modern residential tenancy:

> The assumption of landlord-tenant law, derived from feudal property law, that a lease primarily conveyed to the tenant an interest in land may have been reasonable in a rural, agrarian society; it may continue to be reasonable in some leases involving farming or commercial land. In these cases, the value of the lease to the tenant is the land itself. But in the case of the modern apartment dweller, the value of the lease is that it gives him a place to live. The city dweller who seeks to lease an apartment on the third floor of a tenement has little interest in the land 30 or 40 feet below, or even in the bare right to possession within the four walls of his apartment. When

> American city dwellers, both rich and poor, seek "shelter" today, they seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.

Javins v. *First National Realty Corp., supra,* 428 F.2d at 1074 (footnote omitted). The cases which have established the implied warranty of habitability explicitly recognize the right of the tenant to receive services over common areas of the landlord's building. "In a multiple dwelling repair may require access to equipment and areas in the control of the landlord." *Id.* at 1078; *see also Jack Spring, Inc.* v. *Little, supra,* 50 Ill. 2d at 365, 280 N.E.2d at 216. By protecting the right of the tenant to use the considerable areas of the building through which must pass the pipes, wires, cables, ducts, and corridors necessary to provide the tenant with water, electricity, telephone service, heat, and safe means of entry and exit, the warranty of habitability performs, on a much larger scale, the same function which Executive Law § 828 performs in protecting the right of the tenant to use the areas on the exterior of the building to which cables must be attached.[12]

Indeed, both housing regulations and tenant-protection rules such as warranty-of-habitability statutes place *affirmative burdens* on building owners to provide physical facilities which are more extensive than the cable hook-ups involved in the

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[12] Another form of landlord-tenant regulation which enforces tenants' rights in areas of a building outside the confines of an individual apartment is rent control. In order to ensure the effective operation of rent control rules, the regulatory authority must exercise control over aspects of the relationship between landlord and tenant in addition to the setting of rent. *See* N.Y. City Adm. Code §§ Y51-5.0(h)(2), Y51-10.0(d), YY51-6.0.3. Otherwise landlords could, in effect, accomplish rent increases by diminishing the services which they provide to tenants. Therefore, rent regulations in New York City have protected tenants' rights in such appurtenances as telephone service, elevator service, laundry service, refuse removal service, heat, hot water, and garage space. *See* New York City Rent and Eviction Regulations § 3(b); New York City Conciliation and Appeals Board, Tenant's and Owner's Rights and Duties Under the Rent Stabilization Law 15 (1981).

current case. *See Queenside Hills Realty Co.* v. *Saxl, supra; see also Tenement House Department* v. *Moeschen,* 179 N.Y. 325, 72 N.E. 231 (1904), *aff'd per curiam,* 203 U.S. 583 (upholding early New York statute requiring installation of water closets). If, in enacting § 828, the Legislature had set forth an affirmative requirement that landlords provide cable hook-ups at their own expense, as part of their responsibilities in operating rental property, there would seem to be little doubt that the statute would be valid. *See also* pp. 32-35, *infra. A fortiori,* a statute which merely authorizes the installation of hook-ups, at no expense to landlords (and which, in § 828(1)(a), provides safeguards to protect landlords from incurring expenses from the installation of facilities) should be valid.

Appellant has cited in her brief a number of New York cases from the early days of television holding that landlords may prevent tenants from placing television antennae on the walls or roofs of apartment buildings. Appellant's brief at 34-35, *citing West Holding Corp.* v. *Cordero,* 114 N.Y.S.2d 668 (Sup. Ct. Kings Co. 1952); *349 East 19th Street, Inc.* v. *Bernstein,* 99 N.Y.S.2d 299 (Sup. Ct. Kings Co. 1950); *Prestipino* v. *Matarazzo,* 99 N.Y.S.2d 606 (Sup. Ct. N.Y. Co. 1950); *Kaplan* v. *Ladimer,* 197 Misc. 270, 97 N.Y.S.2d 642 (App. Term 2d Dept. 1950). These cases, however, do not establish that a tenant does not have a right, appurtenant to his tenancy, to authorize the installation of a cable television hook-up, but simply indicate that not all claims to the existence of appurtenances will survive the balancing test of what is a "reasonable" appurtenance. *See, e.g., Price Realty Co.* v. *Airport Authority,* 175 Neb. 791, 124 N.W.2d 207 (1963); *Telesca* v. *M. L. Bruenn Co.,* 71 Misc. 2d 208, 335 N.Y.S.2d 875 (City Ct. New Roch. 1972). The outcomes of the early television aerial cases cannot determine the result in the case at bar, since the factual context here differs greatly from that of the early cases.

First, of course, the aerials involved in the early cases were much larger and more unsightly than the cable hook-up in the case at bar. *Second,* the social importance of television has increased greatly since the early 1950's, to the point where, in many instances, it plays an important part in everyday intellectual, cultural, and political life. Thus, for example, in

supporting the constitutionality of the statute in the current case, the New York Court of Appeals noted that by including "one television set" in the listing of household items protected from execution by creditors, the New York State Legislature "has explicitly recognized television as a practical necessity of modern living." J.S. A37 n.18, *citing* New York Civil Practice Law and Rules § 5205(a)(5). Similarly, in *City* v. *Comtel, Inc.*, 57 Misc. 2d 585, 293 N.Y.S.2d 599 (Sup. Ct. N.Y. Co. 1968), in which the court upheld the right of a state-licensed cable television company to use city streets over the objection of the city government, the court noted "that television today is a principal medium of mass communication, that its use can no longer be considered a personal luxury, and that, indeed, it may well become a national necessity." 57 Misc. 2d at 615, 293 N.Y.S.2d at 627.

Indeed, one of the strongest statements of the modern view of the leasehold is contained in *Bellomo* v. *Bisanzio,* 142 N.J. Eq. 363, 60 A.2d 64 (1948), in which the Chancellor denied an early assertion by a tenant of the right to erect a television aerial. In *Bellomo,* the tenant, who operated a tavern, sought to erect a freestanding television antenna in the rear yard of the building in which he leased premises. The Chancellor denied this right to the tavern owner, stating that "[t]o erect and maintain in the rear yard the requisite standard to support the antenna would undoubtedly constitute an appropriation by complainants of some part of the yard exclusive and not common in character." 142 N.J. Eq. at 366, 60 A.2d at 65. The Chancellor, however, was careful to limit his holding, to ensure that it would not be interpreted as unduly restricting the rights of tenants. The Chancellor said:

> There are casual and incidental rights and interests which sometimes pass to lessees by implication arising from reasonable needs, conventional uses, or from other circumstances manifesting the probable intentions of the parties. *Hill* v. *Shultz,* 40 N.J.Eq. 164.
>
> No one, I conjecture, has as yet prepared a written lease or contract so copious and diffuse as to

> speak its entire piece. Normally the words of the instrument radiate by implication numerous unexpressed rights and privileges truly within the contemplations of the parties. In a written lease of a dwelling, one would ordinarily search in vain throughout its terms to discover any express and specific grant to the lessee of the privilege to install furnishings, or to cook, dine, and sleep in the premises.
>
> * * *
>
> *. . .Must a lessee now find in his lease the express permission to install a telephone?*

142 N.J. Eq. at 364-65, 60 A.2d at 65 (emphasis added).[13]

In sum, by raising a constitutional challenge to § 828, appellant obscures the nature of that statute. Section 828 does not work a taking any more than many other laws which determine the rights which tenants are entitled to receive when they rent residential premises, and which require landlords to provide physical facilities as part of their responsibilities in the operation of rental premises. Appellant's attempt to invalidate this statute goes back to feudal concepts of real property law, and a narrowly restricted view of the regulatory powers of the states, which have long been rejected by both courts and legislatures.

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[13] Even some of the early New York television aerial cases cited by appellant recognized the increasing importance of television and expressed dissatisfaction with then-existing precedent which required them to sanction landlord interference with the medium. In *349 East 19th Street, Inc.* v. *Bernstein, supra,* the court, while considering itself constrained to rule for the landlord, said "It is regrettable that with the widespread use of ... television instruments some form of relief is not available to these tenants." 99 N.Y.S.2d at 301. Similarly, in *West Holding Corp.* v. *Cordero, supra,* although the court considered itself obliged to rule for the landlord, it noted that "it is obvious that the [landlord] uses the trespass complained of... as a means of obtaining an increased rental," and that the landlord's action was "particularly regrettable for the reason that the tenant and his wife who occupy the apartment are at an age when viewing television is pleasurable for them. . . ." 114 N.Y.S.2d at 669-70. Section 828 responds to this type of concern.

B. Section 828 is Also Supported by the State's Interest in Fostering State-wide Communications and Educational Facilities.

In enacting § 828, the Legislature of New York was not merely exercising its power to regulate the relationship between landlord and tenant. It was also carrying out its power to encourage the distribution and availability of communications and educational facilities among its citizens and residents on a state-wide basis. It was clearly a part of the legislative purpose to widen access to cable television services in New York, as a matter of state policy. This was shown by findings which the Legislature included in Article 28 of the New York Executive Law of which § 828 is a part. These findings are set forth in § 811, which is printed in full in the Appendix at pp.1a-2a, *infra*. The Legislature there stated that the introduction of cable services—

> must be protected from undue restraint and regulation so as to assure cable systems with optimum technology and maximum penetration in this state as rapidly as economically and technically feasible; that municipalities and the state would benefit from valuable educational and public services through cable television systems; that the public and the business community would benefit if served by cable channels sufficient to meet the needs of producers and distributors of program and other communication content services; and that the cable television industry is in a period of rapid growth and corporate consolidation and should proceed in accord with regional and state-wide service objectives. . . .

New York Executive Law § 811.

The legislative history abundantly illustrates the conclusion of the New York Court of Appeals that in enacting § 828, the Legislature sought to protect tenants' rights to receive a "vital business and community service," and to take advantage of a newly developed "educational and communications medium." J.S. A29, A69. For example, in describing cable television's potential educational role, the record which was before the Legislature states:

> [T]he availability of large numbers of channels and the ability to direct them to specific audiences increases the flexibility of the medium for educational purposes: courses can be offered in different subjects simultaneously, or in the same subject at different times; post-graduate education can be offered to members of various professions; job training or retraining programs can be undertaken for the unemployed, the temporarily disabled, or the mother with small children. Programs of a cultural, as well as an instructional, nature may be offered.

Jones Report at 4-5. The report of the New York State Assembly Committee which considered the legislation states that "for higher education, communications are a vital alternative to otherwise limitless expansion of capital construction for instructional and student housing facilities," and that "various government jurisdictions have an essential interest in cable to provide instructional programming, public information, government communication links and municipal services." Standing Committee on Corporations, Authorities and Commissions, *Cable Television (A Public Service — A State Concern)*, Leg. Doc. No. 31 (hereafter cited as "Assembly Report") (1972) at 59. Indeed, the educational potential of cable television was so clear at the time § 828 was enacted that educational authorities were among the strongest supporters of state regulation concerning the providing of cable services. Jones Report at 167-68.

The legislative history also points out that cable television can serve a substantial role in improving citizens' access to governmental services and their ability to participate in public affairs. Specifically, the Jones Report notes that cable television's multi-channel capability makes possible—

> [u]se of television for programs involving governmental assistance.... [T]he CATV system could provide informational programs on employment opportunities, types of government assistance available for various kinds of problems, instructions on driving safety, on home maintenance and on preparation of tax returns.

Jones Report at 5. Similarly, the Jones report states that cable television makes possible increased—

> use of television in programs concerned with politics and public affairs. Through use of appropriate filtering techniques, it is possible for political candidates to tailor their presentations on CATV to their respective constituencies (an impossibility with over-the-air broadcasts), with a substantial reduction in program costs. Also, such techniques could make available programming of interest only to a limited section of a larger city. . . .

Jones Report at 5. The Assembly Report states that "every citizen has an interest in assuring open access to cable television communications for the purposes of local expression and diversity of news and public opinion assured under the first amendment protection of a free press." Assembly Report at 59. In sum, § 828 protects the tenants' right of access to a potentially important means of political participation, a right which is supported under modern landlord-tenant law. *See State* v. *Shack*, 58 N.J. 297, 306-07, 277 A.2d 369, 373-74 (1971); *Francheschina* v. *Morgan*, 346 F. Supp. 833, 838 (S.D. Ind. 1972).

In addition, cable television is not subject to severe spectrum limitations, and the availability of increasing diversity of programs which it provides in itself represents a substantial public benefit. It is, of course, common knowledge that television is an important source of entertainment to persons today. For persons of very limited means, or persons confined to their homes by reason of age or infirmity, television may play an especially important role. The additional access to concerts, dramatic presentations, and educational and public affairs programming which cable television makes possible can make significant contributions to people's lives, the importance of which appellant should not be permitted to dismiss casually.

The states' role in fostering educational and communications interests is equally as fundamental as their role in

regulating economic relationships such as that between landlord and tenant. The states have had from the beginning large responsibilities in the field of education. From the beginning, too, the basic objectives embodied in the First Amendment, and later imposed on the states by the Fourteenth Amendment, have given the states great responsibilities in the field of communications. The states' role in these areas is, moreover, continually expanding, as indicated by this Court's recent upholding, in *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, of a far-reaching State initiative fostering political participation. *See* pp. 43-47, *infra*.

Although the argument based on the regulation of landlord and tenant is perhaps more conventional, the argument made on the basis of the states' power to support and encourage communications and educational facilities in the light of new technology is equally applicable and persuasive. Cable television remains a new industry, and companies are still extending services to many areas of New York State. The state need not wait until this new development has fought its way through the obstructions of landlords and others. The State may well feel that it will better carry out its First Amendment responsibilities by fostering the new development by removing obstructions which might otherwise impede both its growth and its contribution to the community.[14]

C. The Protection Which § 828 Affords to "Cross-overs" Does Not Change the Section's Character as an Instance of Conventional Landlord-Tenant Regulation.

Contrary to appellant's contentions, the protection which § 828 affords to "cross-overs" does not change the Section's character. Cross-overs occur in two types of circumstances: (1) where a cable providing service to tenants in one building is extended to adjacent buildings, and (2) where a cable is placed on a building though no tenants in the building are yet

[14] The view of cable television as an important public service is not limited to the State of New York. *See* Report to the President of the Cabinet Commission on Cable Television 15 (1974).

receiving cable television services.[15] In protecting both types of installation, § 828 remains within the bounds of conventional landlord-tenant regulation.

The first type of cross-over is present in this case, since the line on Mrs. Loretto's building is extended to the adjoining building. Cable companies employ "cross-overs" of this kind because they represent the simplest way to provide service to a group of buildings in close proximity. The alternative method, of extending cables separately from a central distribution point to each individual building, would unnecessarily increase the costs of cable television service, without countervailing advantage. Moreover, the "cross-over" has little practical effect on any land-owner. Indeed, in the current case, the extension to the adjoining building amounts, *in toto*, to four to six feet of additional cable. J.S. A34 n.16. Since, in the case of this first type of cross-over, a cable hook-up would be present in order to serve tenants in the building even in the absence of the cross-over, the small increment of cable necessary to provide the cable television service in an efficient manner should not give rise to constitutional objections. Indeed, the cable necessary to extend service to the next building in line is not, properly speaking, an "increment" at all, since it is a necessary component of an efficient cable television hook-up in the urban setting.

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[15] As noted, *supra*, at p. 5 n.4, the court below distinguished three types of cross-overs: (1) installations where a line servicing tenants in one building is extended to adjacent buildings, (2) installations where an amplifier placed on a building amplifies signals for tenants in that building and neighboring buildings, and (3) installations placed in a building when no tenant yet receives service, in order to provide service to an adjacent building. J.S. A8-A9 n.6. However, the first two categories present similar issues, since, in both cases, a line is attached to provide service to one building, and is then extended to serve others.

Where an amplifier is placed on a building, its presence would apparently be required even in the absence of a cross-over, in order to facilitate service to tenants in the building on which it is installed. There is nothing in the record to indicate that the amplifier is any larger if it serves several buildings than if it serves only one. Thus, using an amplifier to serve more than one building would not place an additional burden on the landlord. The practice makes it possible to provide service to some buildings without installing additional, and unnecessary, amplifiers.

In protecting the second type of cross-over, too, § 828 remains well within the bounds of traditional, non-compensable legislation. There are many examples of legislation which require landlords or land developers to provide facilities for the benefit of persons who may not yet be in residence. The typical housing code, for example, requires landlords to provide adequate facilities at the time of construction, even if no tenant has signed a lease for a particular apartment. *See* New York Multiple Dwelling Law §§ 75, 35, *supra; see also Queenside Hills Realty Co.* v. *Saxl, supra.* Similarly, in many instances, municipalities require developers, at the earliest stages of the planning of a real estate development, to dedicate land for the benefit of future residents. *See Jordan* v. *Village of Menomonee Falls,* 28 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed,* 385 U.S. 4; *Frisco Land & Mining Co.* v. *State,* 74 Cal. App. 3d 736, 141 Cal. Rptr. 820 (1977), *cert. denied,* 436 U.S. 918. These statutes and ordinances require pre-installation for the same reason that § 828 protects cross-overs—it is much more efficient to install common facilities at the time of initial construction than to install them later. The New York Court of Appeals explicitly addressed and endorsed this view of the legislative purpose, stating that the Legislature may properly have provided protection to cross-overs, "in view of the 'negligible unoccupied space' taken up by the installation *and the fact that once CATV facilities have come to a block tenants in the building may be expected to seek service.*" J.S. A37 (footnote omitted; emphasis added), *quoting* the Jones Report at 207.

In protecting cross-over installations, the provisions of § 828 are only as inclusive as is necessary to provide protection to tenants. Specifically, § 828 protects cross-overs only on buildings which are devoted to use as rental property—that is, § 828 protects cross-over installations only where the building is designed or planned for use by tenants who may in the future choose to receive cable television services.[16] This fact, perhaps

[16] Even where tenants in a building are subscribing to cable services when facilities are installed, there may be periods when, owing to normal tenant turnover, no tenant in a particular building is receiving service. If cross-overs were to be prohibited, a landlord would be permitted to destroy cable hook-ups whenever this occurs.

more than any other, shows the true role of § 828. *See* pp. 33-47, *infra*. Section 828 defines a responsibility which landlords must accept as part of their participation in the rental business, in order to ensure that their tenants, both present and future, will be able to receive cable television service on an efficient basis.

Thus, the reasons which support the validity of § 828 with respect to facilities in buildings where tenants already are receiving service are equally applicable to cross-overs. Allowing landlords to interfere with the installation of cross-over hook-ups to serve future tenants will increase costs for all subscribers, both present and prospective. If this can be done despite the policy decision made by the New York Legislature, then landlords will be permitted to succeed in adding unnecessary costs to the fulfillment of the legislative objective of promoting communications and educational facilities by encouraging the extension of cable services to all those who wish to receive them.

III.

EVEN IF § 828 IS VIEWED AS EFFECTING A DIMINUTION OF A PROPERTY RIGHT OF THE LANDLORD, THE SECTION NEVERTHELESS WORKS NO "TAKING" COMPENSABLE UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.

A. Appellant's Contention that a "Per Se" Rule Applies in this Case is Erroneous.

Appellant seeks to bring § 828 within a claimed *"per se"* rule holding that government must pay compensation for all "continuous physical invasions" of private property, however insubstantial the practical effect of the invasion may be. Appellant thus relies on a mechanistic analysis which would preclude examination of the purposes of § 828, the character of the obligation which the section imposes on landlords, and the section's practical effects. But this Court has always followed a practical, factual approach in "taking" cases. The Court has

said that it has "been unable to develop any 'set formula' " in these cases, and that the Court "has examined the 'taking' question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action—that have particular significance." *Kaiser Aetna* v. *United States,* 444 U.S. 164, 175, *citing Penn Central Transportation Co.* v. *New York City,* 438 U.S. 104, 124.

A practical examination of the statute in the case at bar shows that this case does not rise to the level of a "taking." *First,* § 828 represents, at most, a minimal legislative adjustment of the boundaries of the property interests of landlords and tenants. The power of the states to make such adjustments, within appropriate limits, is well established. *Second,* § 828 does not, as appellant suggests, appropriate property for use by the public, but rather establishes an obligation between landlord and tenant which exists *only for so long as the landlord chooses to devote his property to use as rental premises.* Statutes imposing such use-dependent obligations are commonplace.

A prime example of the exercise of the legislative function of adjusting the boundaries of property rights, within appropriate limits, to fit changing social and technological realities, arose from the growth of aviation in this country, which early required revision of the ancient common-law doctrine that a landowner's rights extended upward *ad coelum,* without limit from the surface of the land. When this became a problem, Congress enacted legislation under which the United States asserted "complete and exclusive sovereignty in the air space" of the United States, and granted to the public a right of freedom of transit in all airspace above minimum safe altitudes established by regulation. 44 Stat. 568 (1926), *as amended,* 52 Stat. 973 (1938), *as amended,* 72 Stat. 739, 740 (1958), *codified in* 49 U.S.C. §§ 1301(29), 1304.[17]

[17] Similarly, Congress has authorized and regulated electromagnetic communication, and no question arises because the electromagnetic waves (whatever their nature) pass over and through private property.

This Court endorsed this legislation in *United States* v. *Causby*, 328 U.S. 256, in which landowners resided and operated a chicken farm on property near a municipal airport. During the Second World War, the federal government leased the airport for military purposes, greatly increasing both the noise from low-flying planes and the glare of light in the vicinity of the airport. As a result, the landowners lost the use of their premises, both as a chicken farm and as a dwelling. This Court was faced with the task of determining the extent to which overflights may constitute a taking requiring Fifth Amendment compensation. The Court began by observing that common-law notions of real property interests could furnish only limited guidance in addressing this question. The Court said:

> It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe—*Cujus est solum ejus est usque ad coelum.* But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.

328 U.S. at 260-61 (footnote omitted). The Court in *Causby* thus determined that the question whether a compensable taking had occurred could be addressed only on the basis of a practical inquiry into the extent of the owner's enjoyment of the land which had been destroyed, and held that in the case before it, the record showed sufficient diminution in value to support the finding of the court below that a compensable taking had occurred. 328 U.S. at 266-67.

The case at bar is in many respects similar to *Causby*. Here, as in *Causby*, a competent legislative authority has addressed a new technological development which requires a

delineation of the rights of a class of property-owners. Here, as in *Causby*, the legislature has accomplished the delineation in a way which arguably works an invasion of property rights recognized under the common law. In *Causby*, however, the low overflights by military aircraft unquestionably affected the landowners' property rights to such an extent as to require the payment of compensation. Here, on the other hand, installation of the cables has no practical consequences adverse to the landlord, and represents merely an incident to the residential use by others to which the landlord has already committed his property.

Many other developments in the law have rested on the power of courts and legislatures to make adjustments of the boundaries of common-law property rights. *See e.g., Block* v. *Hirsch*, 256 U.S. 135, 157 (in upholding tenant's right under early rent control statute to remain in possession of premises after end of term of lease, this Court noted that common-law property rights are subject to "legislative modification"); *Javins* v. *First National Realty Corp., supra; see also Silver* v. *Silver*, 280 U.S. 117, 122; *Munn* v. *Illinois*, 94 U.S. 113, 134. In view of this doctrine, even a *per se* rule such as that which appellant asserts could not determine the validity of the statute in this case.

In any event, a *per se* rule would apply only to what might be called a "true" taking in eminent domain, in which the government, in fulfillment of public ends, takes property *qua* property, regardless of the use to which the owner has chosen to put it.[18] Takings of this nature include the building of a railroad or highway or telegraph line, or the flooding of a reservoir, where the necessary land or easement is taken for a particular use without regard to the purposes to which the owner has devoted his property, and where the underlying property interest is made unavailable to the owner for the use to which

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[18] *Cf. Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 135: "... the Landmarks Law neither exploits appellant's parcel for city purposes nor facilitates nor arises from any entrepreneurial operations of the city. The situation is not remotely like that in *Causby* where the airspace above the property was in the flight pattern for military aircraft."

he would normally and naturally put it. *See* Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 Harv. L. Rev. 1165, 1184-85 (1967). Thus, for example, when a telephone company installs poles across land, each landowner is affected by the installation of the poles, regardless of the use to which he has put his property. Similarly, where a public authority condemns land for a highway, all land in the path of the highway is taken, regardless of the use to which the land is being put.

Here, however, § 828 protects the installation and maintenance of cable facilities only as an incident to the use to which the landlord has devoted his property. The landlord may convert the building to a factory, or tear it down and build a retail store, and the cable company can no longer claim protection from § 828. *The statute in this case is applicable only when and while the landlord chooses to use the building for rental purposes.* Indeed, § 828 affects appellant's property in this case only *because* appellant has chosen to use her property as a multiple dwelling, and only for so long as she continues to use it for rental purposes. It is for this reason that we have called the provisions of § 828 "use dependent."[19]

The *per se* test which appellant sets up could not apply to obligations such as that involved in this case, which depend upon the use to which a landowner has devoted property. If it did, then every provision which required landlords to devote a portion of their premises to physical facilities such as mailboxes and fire extinguishers, or to allow utility hook-ups, would

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[19] This concept was perhaps first formulated by Justice Brandeis in his concurring opinion in *Delaware, Lackawanna & Western Railroad Co.* v. *Town of Morristown,* 276 U.S. 182, 200-201, where he said of an ordinance establishing a taxi stand on a railroad's property, that if "the town should pass an ordinance establishing, on the driveway, a taxi-stand available only to incoming passengers, I see no reason why, under the contract between it and the railroad or under the general laws of New Jersey, it may not do so."

Similarly, in *Health Department v. Rector of Trinity Church, supra,* in countering the landlord's contention that the State had effected a taking by requiring the landlord to install plumbing fixtures, the court said (per Peckham, J.), "There are sometimes necessary expenses which inevitably grow out of the use to which we may put our property . . . ." 145 N.Y. at 42, 39 N.E. at 836.

require the payment of compensation. *See* pp. 16-18, *supra*. Similarly, provisions such as that of § 308(a)(A)(iii) of the Federal Water Pollution Control Act, 33 U.S.C. § 1318(a)(A)(iii), which requires the owner or operator of an enterprise emitting effluents to "install, use, and maintain such monitoring equipment . . . as the Administrator . . . may reasonably require," would constitute a "taking," requiring the government to purchase the space on which monitoring devices must be installed. *See also* Clean Air Act § 114(a)(1), 42 U.S.C. § 7414(a)(1). Requirements for the payment of compensation in situations such as these are not supported by authority, and would be harmful to the public interest, since the statutes involved are in essence regulations of property dependent on the use to which the owner has chosen to put it.

In most cases involving use-dependent obligations, the contention that they constitute *per se* takings has apparently been so unfounded that parties in litigation have not even raised the issue. *See, e.g., Queenside Hills Realty Co.* v. *Saxl, supra; Health Department* v. *Rector of Trinity Church, supra.* In the current case, appellant's claims to compensation in eminent domain perhaps gain some verisimilitude because of the superficial resemblance between the cable hook-ups in the current case and the telegraph and telephone installations which figured in some of the early eminent domain cases. *See* appellant's brief at 28-33. Appellant's attempt to rely on this resemblance, however, invokes an admonition of Justice Holmes in *Block* v. *Hirsch, supra*:

> The fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed. But the notion that the former are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of the police power in its proper sense, under which property rights may be cut down, and to that extent taken, without pay.

256 U.S. at 155.

This is not to say that a statute establishing a use-dependent obligation can never be a taking. A use-dependent obligation can be so intrusive as to require the payment of compensation. *See, e.g., Kaiser Aetna* v. *United States,* 444 U.S. 164 (discussed in detail at pp. 40-43, *infra*); *National Labor Relations Board* v. *Babcock & Wilcox Co.,* 351 U.S. 105 (discussed in detail at pp. 38-39, *infra*). However, where this Court has struck down use-dependent interferences with property rights, it has done so not on the basis of a *per se* test, but on the basis of a careful balancing of the public interest sought to be served and the degree of interference with the owner's property rights.

The following section of this brief will examine occasions on which this Court has applied a balancing test to the evaluation of use-dependent obligations involving physical intrusions on property rights. Specifically, the section will examine (1) cases where this Court has addressed the right of labor organizations to conduct activities on employers' premises; (2) the case of *Kaiser Aetna* v. *United States, supra,* in which the government asserted an easement of right-of-way in favor of the public as a result of a developer's construction of a navigable yacht basin; and (3) the case of *Prune Yard Shopping Center* v. *Robins, supra,* in which the Court upheld an assertion by the State of California of an easement of access in connection with a landowner's operation of a shopping center.[20] In some of these instances, the Court has found compensable takings to have occurred, and in others it has not. What is important, however, is that in each instance, the Court has

[20] This case does not directly involve the issue posed in such cases as *Penn Central Transportation Co.* v. *New York City,* 438 U.S. 104, and *Agins* v. *City of Tiburon,* 447 U.S. 255. Those cases involved the question of when municipal land-use regulations designed for the benefit of the public at large diminish the value of land to so great an extent as to require the payment of compensation in eminent domain. The *Penn Central* and *Agins* opinions hold, with some limitations, that a land-use ordinance will not require the payment of compensation unless the ordinance precludes *all* uses to which the land concerned might reasonably be put. The statute in this case does not, of course, have this effect. Rather, the statute here merely regulates a use of land which is essentially unaffected by the statute.

applied a pragmatic balancing test in determining whether the statutory or state constitutional provisions involved interfered with property rights in such a substantial manner as to render the denial of compensation unfair.

B. Under this Court's Balancing Test Employed in Cases of Interferences With Property Rights Incident to an Owner's Use of Land, This Case Does Not Involve a Compensable Taking.

1. *Cases Involving Labor Legislation*

Federal labor legislation generally delineates and protects the collective bargaining rights of employees. On a number of occasions, this Court has addressed instances where federal regulatory authorities have sought to protect the right of employees and union personnel to conduct activities on the private property of the employer, over the employer's objections. In these cases, the federal authorities, in requiring employers to permit certain uses of their property, were enforcing precisely the same requirement on employers as the State of New York is enforcing on landlords in the current instance—specifically, the requirement that so long as a landowner wishes to put property to a certain use, the landowner may be required in proper circumstances to permit the property to be employed for purposes incident to that use, though this may be contrary to the desires of the landowner.

In the leading case of *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U.S. 793, the Court affirmed a determination of the National Labor Relations Board which upheld the right of employees to distribute union membership application cards on the employer's premises during lunch periods. The Court recognized that under the common law, a landowner had far-reaching rights to regulate the uses to which privately owned property could be put. However, the Court also recognized that in guaranteeing employees the right to organize for collective bargaining, the federal regulatory program would inevitably conflict with this right. Indeed, the federal regulatory scheme could not work if every conflict between regulatory initiatives and common-law property rights

had to be resolved in an eminent domain proceeding. Thus, the Court said, "It is not every interference with property rights that is within the Fifth Amendment. . . . Inconvenience, or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining." 324 U.S. at 802 n.8, *quoting LeTourneau Co.*, 54 N.L.R.B. 1255, 1259 (1944).[21] The Court upheld the determination of the NLRB that allowing employees to distribute the membership applications represented a reasonable balance between the property rights of the employer and the collective bargaining rights of the employees.

In the subsequent case of *National Labor Relations Board* v. *Stowe Spinning Co.*, 336 U.S. 226, the Court made more explicit the balancing test which it has applied in the labor organizing cases. In *Stowe*, the Court upheld a determination by the NLRB that an employer's denial to a labor organization of the right to use a meeting hall in a company-owned town had impermissibly infringed on the bargaining rights of the employees. In its argument to this Court, the employer in *Stowe*, like the landlord in the current action, attempted to portray the

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[21] The NLRB was, in turn, quoting the opinion of Judge Augustus Hand in *National Labor Relations Board* v. *Cities Service Oil Co.*, 122 F.2d 149, 152 (2d Cir. 1941), in which the Court of Appeals upheld the right of union organizers to board merchant vessels in order to meet with employees. The quotation is taken from a passage in which Judge Hand drew an analogy, which is especially relevant to the case at bar, between federal labor legislation and laws regulating relationships between landlords and tenants:

> The respondents make the . . . contention that the order of the Board is invalid because it unlawfully interferes with their property rights in contravention of the Fifth Amendment of the Constitution of the United States by compelling them to part with the complete control of their vessels. Such an argument, if applied generally, would invalidate the Multiple Dwelling Law of New York, Consol. Laws, c.61-a, § 1 et seq., the statutes securing tenants in times of financial depression against disturbance in the possession of their leaseholds when the terms have expired. It is not every interference with property rights that is within the Fifth Amendment and we see no basis for invoking the Constitution in the present situation.

122 F.2d at 152.

NLRB's decision as a taking by describing the employer's dominion over the hall in categorical, common-law terms. In the words of the Court:

> Stowe tells us that its case is far removed from the principles established in [*Republic Aviation Corp.*]: the Board is now invading private property unconnected with the plant, for a private purpose, in the very teeth of the Fifth Amendment. "From Magna Charta on down," we are warned, "the individual has been guaranteed against disseisin of his property."

336 U.S. at 229. The Court rejected this attempt to characterize the issues, holding that "[t]he question is of course one of degree. . . . In the background of discrimination found by the Board in this case, we cannot say that its conclusion should be upset." 336 U.S. at 230 (footnote omitted).

In *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105, the Court applied a similar balancing test in holding that employers had not violated the National Labor Relations Act by prohibiting non-employee union organizers from distributing literature on company-owned parking lots. The Court emphasized that it had not reached its decision on the basis of a metaphysical categorization of the employers' right to exclude persons from its premises as a common-law "property right," but rather on the basis of a pragmatic weighing of the interests of the property owner and the employees:

> This is not a problem of always open or always closed doors for union organization on company property. Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization. But when the inaccessibility of employees makes ineffective the

> reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize.

351 U.S. at 112. In *Babcock & Wilcox*, the Court concluded that the distribution of literature on the parking lots was not required for effective communication with the employees, and that the action of the employers in excluding the organizers therefore had not been impermissible.

This Court has maintained the balancing test which it established in *Republic Aviation*, *Stowe*, and *Babcock & Wilcox*, in more recent decisions involving the rights of labor organizers to conduct activities on private property. For example, in *Hudgens* v. *National Labor Relations Board*, 424 U.S. 507, the Court remanded to the Board the question whether employees could picket outside a retail store in a privately owned shopping center. In instructing the Board on the proper test to apply in deciding the issue, the Court said:

> [T]he rights and liabilities of the parties in this case are dependent exclusively upon the National Labor Relations Act. Under the Act the task of the Board, subject to review by the courts, is to resolve conflicts between § 7 rights and private property rights, *"and to seek a proper accommodation between the two."*

424 U.S. at 521 (emphasis added), *quoting Central Hardware Co.* v. *National Labor Relations Board*, 407 U.S. 539, 543. Similarly, in *Eastex, Inc.* v. *National Labor Relations Board*, 437 U.S. 556, the Court upheld an NLRB order permitting employees to distribute union literature on the employer's property during non-working hours. The Court held that the employer's reliance on his common-law property interest was "largely misplaced," since the employees who wished to distribute literature were already present on the employer's property by virtue of the employment relationship. 437 U.S. at 572-73. Moreover, the Court noted that the workplace was the only practical place for the dissemination of the materials, since the workplace "is the one place where [employees] clearly share

common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees." 437 U.S. at 574, quoting *Gale Products,* 142 N.L.R.B. 1246, 1249 (1963).

The situation of the landlord and the tenants in the current instance closely parallels the situations of the employees in the progression of decisions from *Republic Aviation* to *Eastex*. The landlord and the tenants, like the employers and employees, have entered into an economic relationship in which they share interests in certain physical facilities. The tenant in the present case is already present on the landlord's property as part of the landlord-tenant relationship, just as employees in the labor cases have been on the employers' property as part of of the employer-employee relationship. Moreover, the New York State Legislature has here declared the availability to tenants of cable television services to be a desirable legislative goal, just as Congress has sought to protect employees' collective bargaining rights by enacting legislation to that end. Whatever infringement on property rights is, in fact, involved in the current instance is, like the infringements in the labor cases, reasonably incident to the accomplishment of the legislative purpose.

2. *The Kaiser Aetna Case*

Since appellant seeks to use as a talisman the analogy between the traversing of her property with a cable and a common-law easement for a right of way, it is useful to review a recent case in which a common-law easement unquestionably was involved. In *Kaiser Aetna* v. *United States,* 444 U.S. 164, a real estate development firm had acquired a land-locked tidal pond which was separated from the ocean by a barrier beach. Traditionally, tidal ponds of this nature had been used in Hawaii for fish farming, and had been treated the same, for ownership purposes, as fast lands.[22] In order to facilitate the

[22] In the words of the Court:

> Kuapa Pond, and other Hawaiian fishponds, have always been considered to be private property by landowners and by the

(Footnote Continues)

development of the marina, the new owners of the pond obtained a permit from the U.S. Army Corps of Engineers to dredge a channel connecting the pond to the sea.

The new owners developed the area surrounding the pond into a residential community, and developed the pond itself into a yacht harbor, for the use of which the lessees of waterfront lots as well as other persons agreed to pay fees. After the developers had put their plans into operation, the United States instituted litigation in which the government contended that by dredging a channel to the ocean, the developers had rendered the pond navigable, and that the developers were therefore required to allow public access to the pond. Thus, in *Kaiser Aetna,* the government claimed that an easement in favor of the public was implied by the use to which the developers had put the property. The Court determined that under the circumstances of the case, the government unfairly sought to appropriate to the public the benefits of the developers' endeavors, and held that in order to compel public access to the pond the government would be required to pay compensation to the developers. The case did not involve any effort by the government to regulate relations between the developers and the owners of property at the marina.

Appellant uses *Kaiser Aetna* as the cornerstone of her argument that this Court should apply a *per se* test in the current instance. Appellant's brief at 21-23. Appellant bases this position on the statement of the Court, in the final sentences of its opinion in *Kaiser Aetna,* that "even if the Government physically invades only an easement in property, it must nonetheless pay just compensation." 444 U.S. at 180. However,

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(Footnote Continued)

> Hawaiian government. Such ponds were once an integral part of the Hawaiian feudal system. And in 1848 they were allotted as parts of large land units, known as "ahupuaas," by King Kamehameha III during the Great Mahele or royal land division. Titles to the fishponds were recognized to the same extent and in the same manner as rights in more orthodox fast land.

444 U.S. at 166-167.

appellant's use of this phrase in isolation mischaracterizes the Court's opinion. The Court used this language only after a detailed, factually-oriented discussion of the competing interests of the landowners who had financed the development of the marina and the members of the public who would benefit from a right of access. That is, the Court first determined, on the basis of a balancing test, that a compensable interest had, in fact, been taken, and only then used the summary language cited by appellant. Moreover, the analysis which the Court used, rather than supporting appellant's claims, actually underscores the minimal nature of the interest which she asserts.

For example, the Court said:

> [T]his Court has generally "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." [*Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).] Rather, it has examined the "taking" question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action—that have particular significance.

444 U.S. at 175 (footnote omitted). In the current instance, an evaluation of the facts of the case against each of these criteria makes clear the weakness of appellant's position compared to that of the petitioner in *Kaiser Aetna*. For example, the "impact of the regulation" on the petitioner in *Kaiser Aetna* was substantial, since the petitioner was faced with the conversion of what it had anticipated would be a private recreational retreat into a public park. In the current case, however, the sole practical impact of the regulation will be that tenants, who are already present in appellant's building, will, as a part of their rights as tenants, have access to cable television, just as they already have access to water, electricity, and telephone

service, all involving physical facilities installed in the landlord's space. Similarly, the assertion of a public right of access to the yacht basin in *Kaiser Aetna* frustrated the investors' expectations, which had been reinforced by the actions of the Corps of Engineers, that the recreational facilities which they were building would be available for the exclusive use of those paying for access. 444 U.S. at 179-180. Here, in contrast, New York's highest court, after examining the legislative record, noted "the absence of any reasonable expectation on the part of the landlord that the space thus utilized (or invaded) would ever be income productive." J.S. A73.

The final test for the compensability of a taking under *Kaiser Aetna* is the character of the governmental action. The governmental action in *Kaiser Aetna* was an attempted imposition of an easement for the benefit of the public, the appropriation of which substantially altered the character of the private development. The governmental action in the current case consists in placing on the landlord an obligation (or, more accurately, a disability) which has only a *de minimis* physical effect on the rental premises, and which in no way alters the fundamental nature of the real property interest to which the landlord holds title.[23] Thus, for appellant to claim that the character of the governmental action here is at all similar to the character of the governmental action in *Kaiser Aetna* is to ignore every practical element of the case at bar.

3. *The PruneYard Case*

Recently, in *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, this Court addressed in a novel context the question of the limits of the states' power to restrict common-law property rights. In deciding *PruneYard*, the Court confirmed the

[23] Indeed, § 828 provides significant safeguards to ensure that any intrusion remains *de minimis*. Section 828(1)(a)(ii) gives the landlord power to require indemnification from the cable company "for any damage caused by the installation, operation or removal" of cable television facilities. Moreover, the landlord may require "that the installation of cable television facilities conform to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises, and the convenience and well-being of other tenants. . . ." § 828(1)(a)(i).

pragmatic balancing test which it has applied in determining when compensable takings have occurred in cases of use-dependent interferences with property rights. In its opinion, the Court explicitly underscored the inappropriateness of the talismanic application of the "physical invasion" language which appellant seeks to invoke here.

In *PruneYard*, a group of high school students sought to distribute leaflets and circulate a political petition in a large, privately-owned shopping center in California. Soon after the students began soliciting signatures, a security guard informed them that their activities violated shopping center regulations and asked them to leave. The students left as requested, but filed suit in state court seeking to enjoin the owner of the shopping center from denying them access to the premises. Ultimately, the California Supreme Court held that under freedom-of-speech provisions of the California State Constitution, the landowner could not deny the students the right to speak and petition on the premises.[24] *Robins* v. *PruneYard Shopping Center*, 23 Cal. 3d 899, 910, 592 P.2d 341, 347, 153 Cal. Rptr. 854, 860, *aff'd*, 447 U.S. 74. The shopping center owner then appealed to this Court, which upheld the decision of the California Supreme Court against a claim by the owner that it deprived him of a real property interest without compensation.

The Court in *PruneYard* explicitly rejected the position that the application of a *per se* test could determine the outcome of the case:

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[24] In *PruneYard*, this Court addressed the question whether, under the Fifth and Fourteenth Amendments, a state government, acting pursuant to state law, could enforce the right of entry which California asserted there. This Court was not concerned with the question whether the First Amendment of the Federal Constitution required the shopping center owner to allow the students to enter the center. 447 U.S. at 80-81; *cf.* the concurring opinions of Justice Marshall, 447 U.S. at 89-95, and of Justice White, 447 U.S. at 95-96. Thus, *PruneYard* is distinguished from the line of cases which includes *Marsh* v. *Alabama*, 326 U.S. 501; *Lloyd Corp.* v. *Tanner*, 407 U.S. 551; and *Amalgamated Food Employees Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308.

> It is true that one of the essential sticks in the bundle of property rights is the right to exclude others. *Kaiser Aetna* v. *United States*, 444 U.S. 164, 179-180 (1979). And here there has literally been a "taking" of that right to the extent that the California Supreme Court has interpreted the State Constitution to entitle its citizens to exercise free expression and petition rights on shopping center property. But it is well established that "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense." *Armstrong* v. *United States*, 364 U.S. 40, 48 (1960).

447 U.S. at 82 (footnote omitted). The Court in *PruneYard* applied the same balancing test which it had applied in *Kaiser Aetna*, and in language which explicitly underscores the invalidity of the argument of appellant in the current case, upheld the decision of the California Supreme Court:

> There is nothing to suggest that preventing appellants from prohibiting [the distribution of leaflets and the circulating of petitions] will unreasonably impair the value or use of their property as a shopping center. The PruneYard is a large commercial complex that covers several city blocks, contains numerous separate business establishments, and is open to the public at large. The decision of the California Supreme Court makes it clear that the PruneYard may restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions. Appellees were orderly, and they limited their activity to the common areas of the shopping center. *In these circumstances, the fact that they may have "physically invaded" appellants' property cannot be viewed as determinative.*

447 U.S. at 83-84 (emphasis added).

In the current case, just as the students' right of entry in *PruneYard* did not "unreasonably impair the value or use of [the owner's] property as a shopping center," the installation of

cables will not unreasonably impair the use of appellant's property as an apartment building. Indeed, the availability of cable television services will enhance this use. In addition, just as in *PruneYard* the entry of the students did not present a significant change in the use of the shopping center, appellant's building in the current case is already used as an apartment building, with all of the utility hook-ups and other physical alterations to the premises which are incident to this use. Thus, the installation of the cable imposes no significant burden on appellant.[25] Moreover, just as the decision of the California Supreme Court in *PruneYard* gave the shopping center owner ample authority to adopt reasonable time, place, or manner regulations, the statute in the current case permits the landlord to require "that the installation of cable television facilities conform to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises, and the convenience and well-being of other tenants. . . ." New York Executive Law § 828(1)(a)(i).

Appellant seeks to distinguish *PruneYard* and the other cases on which this brief relies by asserting that this case involves a "continuous" physical invasion. But § 828 applies only as long as the property is used for rental purposes. In any event, this distinction is formalistic and conceptual; it gives no weight to the *de minimus* extent of intrusion in this case, and thus ignores the practical approach adopted by this Court in the cases just reviewed. Finally, appellant ignores the fact that the distinction which she sets up would apply as easily to *Block* v. *Hirsch, supra* (which allowed a tenant to continue to occupy space on the landlord's premises for a period of up to two years), and *Queenside Hills Realty Co.* v. *Saxl, supra* (in which the required sprinkler systems clearly constituted a continuous physical invasion), as it applies to this case.

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[25] Indeed, in the current case—

> [p]laintiff Loretto testified at her deposition that she purchased the building in 1971 and took title on February 28, 1972, that she was on the roof to inspect it prior to the closing of title and a number of times after the closing while a new roof was being installed, but that she never saw the cables until CATV service was provided to one of her tenants about two years after her purchase.

J.S. at A14-A15.

In sum, any invasion of common-law property rights which is involved here can no more dictate an outcome in favor of the landlord than the mere fact that the property rights of the shopping center owner had been infringed dictated the result in *PruneYard.* Rather, here, as in *PruneYard,* the question whether a taking has occurred must be determined with reference to a practical balancing test. Moreover, just as in *PruneYard* the California Supreme Court's judgment that the state constitutional provisions imposed a reasonable responsibility on the shopping center owner was upheld, the judgment of New York's highest court in this case that the Legislature has placed a reasonable responsibility on landlords should be affirmed.

IV.

THE NEW YORK STATE LEGISLATURE'S JUDGMENT THAT § 828 SERVES IMPORTANT PUBLIC INTERESTS, AND ACHIEVES A PROPER BALANCE BETWEEN THE INTERESTS OF LANDLORDS AND TENANTS, DOES NOT VIOLATE THE DUE PROCESS CLAUSES OF THE FEDERAL CONSTITUTION.

Appellant contends that the utility of § 828 is "minimal," and that in protecting tenants' rights to receive cable services the New York State Legislature did not properly balance the burdens and benefits of the legislation. However, the state's highest court, in its decision in this case, addressed the legislative history, and upheld the balance reached by the Legislature. Appellant has offered no compelling reason why this Court should overturn the judgment of the Legislature, as upheld by the New York Court of Appeals. The actions of New York, both legislative and judicial, clearly complied with the requirements of due process.

We have already shown how the Legislature relied on its concern for the development of communications, education, and political participation (pp. 23-26, *supra*), and that material is fully relevant here in considering the due process question. Moreover, in protecting tenants against landlord interference,

the Legislature addressed a danger that was not merely speculative. The Legislature passed § 828 in part in response to testimony by the Chairman of the New York State Public Service Commission that landlords were exacting "onerous fees" for the right to receive cable television services. J.S. A33. Moreover, the Jones Report states that of all consumer complaints relating to cable television, "[t]he complaint heard most often pertains to landlord interference with a tenant's access to CATV services." Jones Report at 166. Indeed, in summarizing recommendations for regulation of cable television in the New York City area, the Jones Report notes: "The most useful thing that the government could do at this time is to assure that landlords do not impose obstacles to tenant subscription to CATV." Jones Report at 181.

Appellant's contention that the Legislature did not give sufficient consideration to the interests of landlords is without merit.[26] The Legislature recognized the interest of the landlord in protecting his building from physical damage, and therefore provided the landlord with the power of supervision over the installation of facilities, as well as the right to receive indemnification from cable companies for any damage which might occur. The Legislature also considered the landlord's claimed interest in exacting payment for the installation of cable television service. The Legislature concluded, however, that in view of the substantial interest of tenants in receiving cable television services, whatever "hold-up" value the landlord could derive from exacting fees for the provision of this service did not rise to the level of an expectation worthy of governmental protection. For example, the Jones Report noted that the proposed legislation would involve—

> some intrusion upon the property interest of the landlord. But the interest intruded upon is a wholly abstract one—given the conditions specified, the

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[26] Appellant raises the objection on page 101 of her brief that there is no "reciprocity of advantage" under § 828. To the extent that appellant is suggesting that a statute may not burden or benefit one class or group more heavily than another, her claim is, of course, unfounded. *International Harvester Co.* v. *Missouri*, 234 U.S. 199.

> landlord's interest *consists entirely of insisting that some negligible unoccupied space remain unoccupied.* The tenant's interest clearly is more substantial, consisting of a right to receive (and perhaps send) communications from and to the outside world. In the electronic age, the landlord should not be able to preclude a tenant from obtaining CATV service (or to exact a surcharge for allowing the service) any more than he could preclude a tenant from receiving mail or telegrams directed to him.

Jones Report at 207, *quoted at* J.S. A32-A33 (emphasis supplied by the New York Court of Appeals).

Finally, appellant's argument at pp. 89-91 of her brief that the Legislature did not give sufficient consideration to "alternative means" misconstrues the aims of § 828. The goal of the Legislature in enacting § 828 was to preclude landlords from exacting fees in return for the right to install cable hook-ups. The "alternative means" available to the Legislature was to abdicate its role entirely, and let landlords extract what the market would bear. It is understandable that the landlord in this case would prefer that the Legislature had taken this path. That the Legislature chose not to do so, however, was well within its power to exercise its judgment in light of its view of the public interest, and neither the statute nor the decision of the court below upholding this legislative judgment violates a proper standard of due process.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

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January, 1982.

Appendix

APPENDIX A

Sections 811 and 828 of Title 28 of the New York Executive Law read as follows:

§ 811. Declaration of legislative findings and intent

Upon investigation of the public interest associated with cable television, the legislature of the state of New York has determined that while cable television serves in part as an extension of interstate broadcasting, operations involve public rights-of-way, municipal franchising, and vital business and community service, and, therefore, are of state concern; that while said operations must be subject to state oversight, they also must be protected from undue restraint and regulation so as to assure cable systems with optimum technology and maximum penetration in this state as rapidly as economically and technically feasible; that municipalities and the state would benefit from valuable educational and public services through cable television systems; that the public and the business community would benefit if served by cable channels sufficient to meet the needs of producers and distributors of program and other communication content services; and that the cable television industry is in a period of rapid growth and corporate consolidation and should proceed in accord with regional and state-wide service objectives; and, many municipalities lack the necessary resources and expertise to plan for and secure these benefits and to protect subscribers and other parties to the public interest in franchise negotiations.

There is, therefore, a need for a state agency to develop a state telecommunications policy; to promote the rapid development of the cable television industry responsive to community and public interest and consonant with policies, regulations and statutes of the federal government; to assure that cable television companies provide adequate, economical and efficient service to their subscribers, the municipalities within which they are franchised and other parties to the public interest; and, to encourage the endeavors of public and private institutions, municipalities, associations and organizations in developing programming for the public interest.

It is the intent of the legislature in the enactment of this article to vest authority in an independent commission to oversee development of the cable television industry in New York State in accordance with a statewide service plan; to review the suitability of practices for franchising cable television companies to protect the public interest; to set standards for cable television systems and franchise practices; to assure channel availability for municipal services, educational television, program diversity, local expression and other program and communications content services; to provide consultant services to community organization and municipalities in franchise negotiations; and, to stimulate the development of diverse instructional, educational, community interest and public affairs programming with full access thereto by cable television companies, educational broadcasters and public and private institutions operating closed circuit television systems and instructional television fixed services.

§ 828. Landlord-tenant relationship

1. No landlord shall

a. interfere with the installation of cable television facilities upon his property or premises, except that a landlord may require:

i. that the installation of cable television facilities conform to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises, and the convenience and well-being of other tenants;

ii. that the cable television company or the tenant or a combination thereof bear the entire cost of the installation, operation or removal of such facilities; and

iii. that the cable television company agree to indemnify the landlord for any damage caused by the installation, operation or removal of such facilities.

b. demand or accept payment from any tenant, in any form, in exchange for permitting cable television service on or within his property or premises, or from any cable television company in exchange therefor in excess of any amount which

the commission shall, by regulation, determine to be reasonable; or

c. discriminate in rental charges, or otherwise, between tenants who receive cable television service and those who do not.

2. Rental agreements and leases executed prior to the effective date of this article may be enforced notwithstanding this section.

3. No cable television company may enter into any agreement with the owners, lessees or persons controlling or managing buildings served by a cable television, or do or permit any act, that would have the effect, directly or indirectly of diminishing or interfering with existing rights of any tenant or other occupant of such building to use or avail himself of master or individual antenna equipment.

APPENDIX B

Statement Required by Rule 28.1

Teleprompter Manhattan CATV Corporation ceased to exist as a separate corporation on December 31, 1977 and since then has been a division of Teleprompter Corporation. Teleprompter Corporation is a wholly-owned subsidiary of Westinghouse Cable Acquisition, Inc. Westinghouse Cable is in turn wholly owned by Westinghouse Broadcasting Company, Inc., which is a wholly-owned subsidiary of Westinghouse Electric Corporation. The following is a list of less than wholly-owned subsidiaries of Teleprompter Corporation:

Cable TV General, Inc.
El Paso Cablevision, Inc.
Focus Cable of Oakland, Inc.
Funktionelle Musik Gmbh
Grosse Pointe Cable, Inc.
Kaiser-Teleprompter of Hawaii, Inc.
Piedmont Cablevision, Inc.
Showtime Entertainment (a partnership)
Southwest Video Corporation
Telcom Cablevision, Inc.
Teleprompter of Columbia Heights/Hilltop, Inc.
Teleprompter Community Cablevision
(a partnership)
Teleprompter of Denver, Inc.
Teleprompter of Lorain County, Inc.
Teleprompter of St. Bernard, Inc.
Teleprompter of Worcester, Inc.

The following is a list of less than wholly-owned subsidiaries of Westinghouse Electric Corporation:

Ateliers de Constructions Electriques
de Charleroi, S.A. (ACEC)
CATV Enterprises, Inc.
China Industry Services Co., Ltd.
CDSW Ireland Limited
CMW Equipamentos, Ltda. (CMWE)
CMW Sistemas, Ltda. (CMWS)

Compagnie des Dispositifs Semiconducteurs Westinghouse (CDSW)
Eletrocontroles Villares, Ltda.
Eletromar Industria Electrica Brasileira, S.A.
Eletromar Nordeste, S.A.
Ercole Marelli & Company, S.p.A.
Etic B.V.
Galileo Argentina C.I.S.A.
Galileo Uruguaya, S.A.
Home Theatre Network, Inc.
IEM S.A.
Industria IEM, S.A. de C.V.
Mex Control, S.A. de C.V.
Industry Services Company of Saudi Arabia, Ltd. (ISCOSA)
Living & Learning (Cambridge), Ltd.
Mecanica Pesada, S.A.
Mitsubishi Nuclear Fuel Co., Ltd.
Motores Electricos de Juarez S.A. de C.V.
Schneider S.A.
Silectra S.A. de C.V.
Societa Progrettiazione Reattori Nucleari, S.p.A. (SGPREN)
Transformadores de Distribucion, S.A. (TRADESA)
Transformadores TPL S.A.
Tyree Industries Limited
Tyree-Power Construction Limited
Westinghouse Asia Controls Corp.
Westinghouse Canada Inc.
Westinghouse Electric Supply Company of Saudi Arabia (WESCOSA)
Westinghouse Electro Metalurgicas C.A. (WEMCA)
Westinghouse (Jamaica) Ltd.
Westinghouse Proyectos Electricos, S.A. (WEPESA)
Westinghouse, S.A. (WESA)
Wexico Systems Services, Ltd.

Appellant's Reply Brief

2

Supreme Court, U.S.
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CLERK

No. 81-244

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JEAN LORETTO, on behalf of herself and all others similarly situated,

Appellant,

v.

TELEPROMPTER MANHATTAN CATV CORP., TELEPROMPTER CORPORATION and CITY OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

REPLY BRIEF

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March 16, 1982

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POINT I

THE ACTION IS A CLASS ACTION FOR PURPOSES OF THIS APPEAL

Even though New York's highest court has confirmed that this action is a class action (JSA2,5-6; see JSA130), Teleprompter devotes its entire Point I to arguing that it is not a class action because, pursuant to agreement of the parties (including Teleprompter), notice to the class has not been given pending the disposition of the summary judgment motion which is the subject of this appeal. The argument is pointless because, even though the decisions thus far in this case would have no res judicata effect on class members, the record and factual background (including crossovers since Appellant's property has been subjected to both types of cable installations)*

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* From 1970 (JtA 157ff) or 1972 (JtA 11,89-91), the installation was a pure crossover

(Footnote continued on next page)

are the same for purposes of this appeal as they would be had notice been given.

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with no tenant service. In 1974, a tenant service line was dropped to the first floor (JtA12,83).

The suggestions by Appellees and their amici that the cable installations are unnoticeable, and even advantageous, are not supported by the record and are immaterial as a matter of law. Mrs. Loretto (who is by profession a real estate sales person) specifically stated that she believed the installation diminished the value of the building because it is "ugly" (JtA99). The installation became painfully visible around January 1974 when the two large silver boxes and the tenant service lines dangling down the front of the building were added (JtA12,83,90,91, 93). In any event, extent of diminution of value is never treated as a factor in determining whether a taking has occurred in physical occupation cases (Michelman, "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law," 80 Harv. L. Rev. 1665, 1190-1 (1967) (hereinafter cited as "Michelman")) and the extent of damages is irrelevant to the issue of liability on the trespass claims involved here (JtA14). Prosser, Torts 66 (4th ed. 1971). See, e.g., St. Louis v. Western Union Telegraph Co., 148 U.S. 92 (1893); New York Telephone Co. v. Town of North Hempstead, 41 N.Y.2d 691, 395 N.Y.S.2d 143 (1977); Bunke v. Frontier Telephone Co., 110 App. Div. 241, 97 N.Y.S. 66 (1st Dep't 1905), aff'd, 188 N.Y. 600 (1907).

Moreover, if this Court were to reverse, the case would clearly proceed again in the New York courts as a class action.*

POINT II

EXECUTIVE LAW SECTION 828 VIOLATES THE TAKING CLAUSE**

A. The Public Benefits of Cable Television Cannot Justify A Taking Without Compensation

Appellees and their amici devote much attention to demonstrating that cable television is a "good thing." This premise may tend to satisfy the "public use" portion of the taking clause (or the

---

* Teleprompter's other procedural point--its suggestion of irregularity with respect to Appellant's Notice of Appeal (TPT Br. 2 n.1)--is incorrect. Pursuant to Rule 10.3 of the Supreme Court Rules, the Notice of Appeal was filed with the clerk of the New York County Supreme Court--the court which, pursuant to the remittitur of the New York Court of Appeals, entered the judgment from which this appeal is taken.

** Appellant rests on the arguments in her main brief (pp.79-107) with respect to the due process claim.

public purpose prerequisite to exercise of the police power); but it barely begins to answer the question whether a compensable taking has occurred. If there is a taking, it must be compensated no matter how beneficial the objective. App. Main Br. 35-8. See also Michelman, op. cit., 80 Harv. L. Rev. at 1193-94.

We assume for purposes of this appeal that cable televison is a "good thing" and even that some predatory landlords would "hold up" cable companies for exorbitantly high fees, or would forbid access to their property altogether, absent some form of legislative action (see TPT Br. 26; NYSCTA Br. 9-10). Section 828, however, is not the only possible solution to such potential problems. Eminent domain procedures are available to cable television companies (JSA22; New York Transportation Corpora-

tions Law § 27), and have been successfully utilized in the past by the telephone and electric industries (also "good things") to prevent "hold ups." Moreover, even the specter of higher subscriber fees due to condemnation awards warrants no special consideration for Appellees: Appellant has already pointed out that the cost of compensating landlords could be passed on to subscribers without adverse effect upon Teleprompter's market penetration (App. Main Br. 105-6) and this demonstration remains uncontradicted.

Thus, the practical issue before this Court is not so simple as whether cable television will survive and prosper (upon a holding that Section 828 is constitutional) or will perish at the hands of predatory landlords (as a result of a holding that Section 828 is unconstitu-

tional). Rather, the question is whether the cable television industry and its subscribers must bear a modest additional expense to compensate landlords for the easements which the industry utilizes.*

---

* New York City's recent actions with respect to granting CATV franchises outside of Manhattan belie its assertion in this case that requiring cable television companies to compensate landlords would jeopardize CATV revenues and thereby jeopardize the City's collection of franchise fees and taxes from CATV companies (Aff. of John Brennan, 3/14/77, on City's motion to intervene, ¶s 3-4). The City has recently demanded that the proposed new franchisees pay the City as much as 8% of gross revenues as a franchise fee even though the State and the Federal Communications Commission permit fees of no more than 5% (New York State Executive Law § 818; 47 C.F.R. § 76.31 (1980)), and Teleprompter currently pays the City only 5% (App. Main Br. 11). New York Times, 2/26/82, p. B3, col. 5. The "franchise" granted by the City is not a business franchise but a license to use City streets for installations and it is precisely analogous to the rights which Section 828 permits cable companies to usurp from landlords (App. Main Br. 94-95n). Thus, the City's real interest is simply in preserving and maximizing its own slice of the pie.

B. Section 828 is Not Merely a Regulation of Landlord-Tenant Relationships and Cannot Be Justified as Such

1. The Statute Does Not Merely Regulate Land-Lord-Tenant Relationships

Any attempt to analyze Section 828 as purely a measure to regulate landlord-tenant relationships overlooks one of the most salient features of that law and of the facts of this case. Above all else, what takes this case out of the landlord-tenant realm is the existence and legislative approbation of crossovers as the standard means for delivering cable television service in urban areas.* This is

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* In the words of Amicus NYSCTA (p. 24, n. 49), "Given the physical layout of cable systems in large cities, the use of 'cross overs' (cable extensions connecting adjoining buildings to the trunk cable) is a practical necessity." Nonetheless, figures presented by Amicus National Cable Television Association, Inc. ("NCTA") (p. 14 n.35) suggest that roof-top block-circuit installations are merely a convenience to cable companies and not truly a "necessity."

(Footnote continued on next page)

not a case where tenants themselves utilize some space outside of their own apartments for the purpose of putting up their own television antennas or even of

(Footnote continued from preceding page)

NCTA's figures suggest that underground installation costs per mile in New York City are at most approximately two-and-a-half to seven-and-a-half times greater than above- or below-ground installations would be in the suburbs. Inasmuch as Teleprompter's "trunk" lines (those running down main thoroughfares) utilize existing underground conduits of Empire City Subways for an annual fee (see App. Main Br. 100), so that new excavation would not always be necessary, the actual average cost of installing underground lines in the Teleprompter service area would probably be lower than that stated by NCTA. But even an urban-suburban installation cost ratio of 2.5:1 to 7.5:1 looks extremely attractive if one considers that New York County (Manhattan) has a population density of 61,658 per square mile--a figure upwards of 13 to 185 times the density of such nearby suburban counties as Nassau (4,567 per square mile), Westchester (1,951 per square mile), Suffolk (1,382 per square mile), Rockland (1,475 per square mile), and Putnam (333 per square mile). (Population density figures are computed from the U.S. Dept. of Commerce, 1980 Census of Population and Housing: Preliminary

(Footnote continued on next page)

leading a television cable from the public street to their own apartments.* Rather, the standard pattern of installation in urban areas is for the cable company to use the roofs of all buildings in a given city block as a "highway" to carry CATV cable around the entire block, with tenant service lines spliced in where desired (App. Main Br. 7-8). Such an installation pattern usurps what hitherto has been universally understood

(Footnote continued from preceding page)

Reports (1981), and U.S. Dept. of Commerce, The County and City Data Book: A Statistical Abstract Supplement 330 (1977)). Teleprompter itself has retreated to the position that crossovers are merely a more attractive alternative to underground installations which "would unnecessarily increase the costs of cable television service, without countervailing advantage" (TPT Br. 27).

* Although such an installation too would require compensation to the landlord. See pp. 11-21, infra.

to be an easement.*

Thus, cases permitting tenants to utilize some facility outside of their prescribed leased space (see, e.g., TPT Br. 12-22 and NYSCTA Br. 20 n.45) are not applicable. Section 828 does not allow a tenant to use some space outside his own apartment; it allows cable television companies to use space on the private property of others and without regard to

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* The contention of Appellees and their amici that the additional installation on Appellant's property constituting the cross-over portion of the installation is de minimis because it involves only a total of some four to six feet of additional cabling (see TPT Br. 27) is specious as well as irrelevant (see page 2n, supra). The length of the additional cable required is solely a function of how much cable was placed on the building in the first instance ostensibly for tenant service purposes. Had Teleprompter chosen to bring the initial cable just beyond the edge of Mrs. Loretto's roof, then some 20 feet of additional cable on each end of the roof (rather than two to three feet) would have been required to cross over to the next neighbor.

whether any tenant on the property seeks CATV service (JSA36-7).

2. The Uncompensated Usurpation of Space Would Be Unconstitutional Even If The Statute Were Limited to Landlord-Tenant Relationships

Even if Section 828 were truly directed solely to landlord-tenant relationships -- as would be the case, for example, if it provided that tenants may install non-crossover CATV service (i.e., leading in from the street) without entitling the landlord to any additional compensation -- it would still be unconstitutional as it would usurp space outside the tenant's apartment. The authorities cited by Teleprompter at pages 12-22 of its brief do not support the constitutionality of even this hypothetical form of statute, but hold merely that, in the absence of a contrary provision in the lease, a tenant may have

the right as a matter of contractual construction to use such of the landlord's facilities as are "necessary" to the tenant's use of the demised leasehold.* Thus, absent a a conflicting provision in the lease, a fourth-floor tenant implicitly has the right to use the elevator (Henry A. Fabrycky, Inc. v. NAD Realty Corp., 261 App. Div. 268, 25 N.Y.S.2d 347 (2d Dep't 1941)), and a commercial tenant, whose intended use of the basement as a pool hall and fountain was known to the landlord when the lease was entered into, may install an outside sign to draw customers (Lambros Metals, Inc. v. Tannous, 71 Ariz. 53, 233 P.2d

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* See generally Annot.: "Easements or Privileges of Tenant of Part of Building as to Other Parts Not Included in Lease", 49 A.L.R.2d 123, particularly § 6 (the implied appurtenance may be negated by the contract); 49 Am. Jur. 2d, "Landlord & Tenant" §§ 197, 198, 203 and 232.

570 (1950)). In these and other similar cases, the essential question is what was contemplated by the parties at the time the lease was entered into.* The landlord was free to prohibit the use proposed by the tenant, but having failed to do so in the lease, was essentially estopped from changing the terms of the contract. Moreover, implicitly, the agreed-upon rent took into account the use which the courts held was presump-

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* See, e.g. cases cited at TPT Br. 13-14; NYSCTA Br. 20. Indeed, Rayhertz Amusement Corp. v. Fulton Improvement Co., 124 N.J. Eq. 121, 200 A. 557 (1938) and Bellomo v. Bisanzio, 142 N.J. Eq. 363, 60 A.2d 64 (1948), affirmatively support Appellant's position. In both, the court condemned an effort by the party not having the requisite possessory interest under the terms of the lease to make a physical installation which would usurp the possessory interest of others, no matter how slightly. In both, there is no indication that the proposed use would have interfered materially with any contemplated use by any person having a possessory interest; it was the mere fact of installation which the court condemned, without regard to its substantiality.

tively contemplated by the parties when the lease was entered into.

Here, in contrast, there can be no implied permission from the landlord for the tenant to use space outside his apartment for television reception purposes as such use was previously prohibited by law in New York State absent explicit landlord consent and additional compensation (App. Main Br. 33-5; see also N.Y.C. Rent Administrator, Operation Bulletin No. C-15, Supplement 10, at Rasch, New York Landlord and Tenant, Rent Control 631 (1971), authorizing rent increases where the landlord consents to installation of a tenant's television antenna or use of the landlord's antenna).*

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* The Rent Administrator's Interpretation No.11 (Rasch, op. cit., at 579) authorizes a rent increase where the landlord permits installation of a through-the-window air conditioner explicitly on the theory that the tenant thereby occupies space outside of his own apartment.

Under Section 828(1)(b), however, not only is the tenant's use of space outside his apartment taken out of the realm of contractual negotiation and imposed upon the landlord, but the landlord is absolutely prohibited from adjusting rent in any way to take into account the new space usage and the new risks and burdens it imposes upon the landlord.* Even as to leases entered into subsequent to the adoption of Section 828, the rent level

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* See App. Main Br. 39-43. Some further justifications for a landlord refusing access to the roof are suggested by Keesey v. O'Reilly, 181 App. Div. 665, 168 N.Y.S. 844 (1st Dep't 1918), in which a landlord was held not liable for a tenant's death caused by part of a chimney falling on her as she hung laundry on the roof. The court held that there was no invitation to go on the roof and that it was not part of the demised space. The court took note that the relatively thin waterproof covering on the roof might be damaged by tenant access and of the risk of injury to persons entering upon the roof. One might add that entry upon the roof jeopardizes building and tenant security by creating a risk that the door to the roof will be left unlocked.

cannot take into account the additional use permitted by Section 828 because Section 828(1)(b) altogether precludes such additional rent.*

This distinction between uses implicitly contemplated by the parties to the lease and external uses which the landlord may prohibit, no matter how necessary they may be, is excellently illustrated by Bellomo v. Bisanzio, 142 N.J. Eq. 363, 60 A.2d 64 (1948) (TPT Br. 26). There, the court recognized that a tenant implicitly has the right to maintain television equipment within his demised space but denied that the tenant would

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* The rent control and rent stabilization laws permit only a given percentage increase upon a change in tenants. See e.g., §§Y51-5.0 and YY51-5.0 of the Administrative Code of the City of New York; and Code of the Real Estate Industry Stabilization Association of New York City, Inc., promulgated under §YY51-6.0, all at 65 McKinney's Unconsolidated Laws (West) after § 8617.

have the right to install an antenna outside of the demised space, even though such an "external receiving antenna is at present essential to the operation of the set." 60 A.2d at 65.

Appellees' contention that a landlord must permit tenants to make permanent external installations for telephone and electric service and that the landlord may not demand compensation for such installations (see, e.g., TPT Br. 42-3) is not accurate. While the legislature may perhaps properly grant tenants the right to make external installations in order to obtain telephone, electric or even television service, the legislature certainly may not do so without providing compensation. Appellees and their amici cite no instance in which the legislature has authorized such conduct without compensation, much less an instance in

which such an authorization has been endorsed by the courts.*

Nor is there involved in this case any question of protecting any "right of

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* For example, although New York Multiple Dwelling Law § 233(f)(3)(b) (TPT Br. 17) prohibits a mobile home park owner from charging additional fees to a tenant who chooses to install an electric or gas appliance inside his mobile home, the statute does not address itself to whether the landlord may receive compensation for the new installation of a gas or electric line outside of the tenant's mobile home on the premises of the park owner. As to telephone and electric line installations, the landlord is clearly entitled to compensation for external installations and is protected from the creation of an implied easement if he chooses not to exercise the right to preclude the service or insist on payment from the telephone or electric company (New York Transportation Corporations Law § 27; New York Real Property Law §§ 261 and 335-a). And, contrary to the implicit suggestion of Teleprompter (TPT Br. 17), landlords are not required to permit the Postal Service to install mail boxes within the landlord's premises. New York Multiple Dwelling Law § 57 addresses itself only to the landlord permitting mail delivery in some form and we find no New York or Federal law or Postal Service regulation which would permit anyone to install a mailbox outside of the tenant's

(Footnote continued on next page)

tenants to do business with whom they wish" (TPT Br. 15-16).* Because Section 828 permits block circuit installations--i.e. crossovers--regardless of any tenant demand in any particular building crossed over, the cable company's right-of-entry under the statute does not depend upon any invitation from tenants who wish to exercise their "freedom of choice" to do business with the cable company.

Moreover, even if Section 828 were limited to non-crossover installations--

(Footnote continued from preceding page)

apartment without landlord consent or without compensation to the landlord. See United States Postal Service v. Council of Greenberg Civic Ass'ns, 49 U.S.L.W. 4813, 4816 (6/25/81). Thus, none of Appellees' authorities support the view that tenants may occupy space without compensating the landlord.

* It is ironic that Teleprompter should assert such a "freedom of choice" argument inasmuch as it is the beneficiary of an exclusive franchise from New York City. (See JtA155 and exhibit referred to thereat, and JtA165).

i.e., to situations where a tenant invites the cable company to provide service from the public street to the tenant's own apartment--Section 828 would still be distinguishable from the "freedom of choice" cases. Unlike those cases where, for example, a tenant wishes to deal with a particular waste removal company* or drinking water supply company** and therefore invites the service company to make transient entries, this case involves permanent installations of equipment outside of the tenant's demised apartment. Landlords have always had the right to prohibit such installations. (See pp. 11-18, supra; App. Main Br. 18-23, 27-25).

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* Federal Waste Paper Corp. v. Garment Center Capital, Inc., 268 App. Div. 230, 51 N.Y.S. 2d 26 (1st Dep't 1944), aff'd, 294 N.Y. 714, 61 N.E.2d 451 (1945).

** Eagle Spring Water Co. v. Webb & Knapp, Inc., 236 N.Y.S.2d 266 (Sup. Ct. N.Y. Co. 1962).

The fallacy of comparing a tenant's right to invite vendors to make transient entries upon the landlord's premises for business purposes, with the right granted by Section 828 to cable television companies to make permanent installations outside of the tenant's apartment, may be highlighted by reference to other types of installations a tenant might wish to have the "freedom of choice" to make. A tenant dissatisfied with the pay laundry equipment provided by the landlord might wish to install his own laundry equipment in the basement. Or, a tenant in an all-electric building might prefer to use a gas range and wish to install a gas line into the building and to his apartment. We seriously doubt that any landlord could be required to permit such installations absent provision for just compensation.

* * *

In sum, a hypothetical Section 828 which was truly directed solely to landlord-tenant relationships would be unconstitutional because it fails to provide compensation for the tenant's use of additional space and facilities. Section 828 as actually written is directed to much more than a regulation of the landlord-tenant relationship and, therefore, is even less sustainable under that rubric.

C. Section 828 Cannot be Justified as a "Use-Dependent" Regulation

Teleprompter's contention that an owner's election to use his property for rental purposes justifies the legislature's imposition of a cable television easement for the tenants' welfare is seriously flawed. (See generally TPT Br. 32-47, particularly at 35). We show in this section that the principle (if one

exists at all) that the legislature may impose any conditions it wishes upon an owner's making a particular use of property, so long as the degree of interference with the owner's property rights is outweighed by the public interest sought to be served, has never before been applied to permanent installations by strangers upon private property and that it would make little sense to do so. (Point II C(1)). Moreover, such a principle has never been applied retroactively to take from an owner "a fundamental element of the property right" (i.e., the right to exclude)* as a condition for

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* Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979). See also civil code definitions (Louisiana Civil Code Ann. Article 488 (West 1952), and California Civil Code Ann. § 654 (West 1954)); Brown, The Law of Personal Property 7 (2d ed. 1955); and Dairy Queen of Oklahoma, Inc. v. Commissioner, 250 F.2d 503, 506 (10th Cir. 1957). Even in the decision appealed from, the Court of Appeals specifically acknowledged "the owner's common law right of exclusion" (JSA62).

permitting the owner to continue to make the same use of his land to which he already has a vested right by virtue of prior use. (Point II C(2)). Finally, we show that Teleprompter's suggestion flies in the face of legions of cases expressly holding that the usurpation of an easement for installation of telephone or electric lines which service the property over which they pass (and therefore may be said to be "use-dependent") constitutes a taking. (Point II C(3)).

1. "Use-Dependency" Cannot Justify a Permanent Installation

None of the cases cited by Appellees and their amici in which transient usage of property under very special circumstances is held not to constitute a taking (see, e.g., TPT Br. 32-47) contains the least suggestion that government may constitutionally permit a stranger to

make a permanent installation upon private property. Indeed, the requirement that employers permit non-employee union organizers to enter isolated employment facilities has been rationalized by this Court on the grounds that (and limited to circumstances where) the entry is transient, does not usurp exclusive occupancy of a specific space, and is strictly limited in time to the duration of an organizational campaign. Central Hardware Co. v. National Labor Relations Board, 407 U.S. 539, 545 (1972); see App. Main Br. 89n-90n. Cf. National Labor Relations Board v. Stowe Spinning Co., 336 U.S. 226, 232-3 (1949), requiring modification of an NLRB order to remove the implication therein that a union organizer could freely use a privately owned meeting hall at all times.

Cases involving requirements that

landlords provide facilities for the safety or health of tenants or for "habitability"* are equally inapplicable. In those cases, the law requires that the landlord himself make an installation which becomes a part of his property. There is no issue of an installation being made of equipment belonging to a third party upon a landlord's property.** And there is no issue of absence of compensation because the landlord may pass on additional costs

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* See TPT Br. 17-8; and e.g., Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946); Health Department v. Rector of Trinity Church, 145 N.Y. 32, 39 N.E. 833 (1895).

** Neither the Federal Water Pollution Control Act, 33 U.S.C. § 1318(a)(A)(iii), nor the Clean Air Act, 42 U.S.C. § 7414(a)(1) (TPT Br. 34), contains any hint that the monitoring equipment which the government may require a property owner to install would not be such property owner's own equipment.

even under rent control laws.*

Thus, Appellees may establish at best that a transient entry is constitutional or that a requirement that the landlord make a compensated installation may be constitutional. But the present case involves a permanent installation and one consisting of a stranger's equipment. As such it is a per se taking. In part, this is because the permanent installation (unlike many instances of transient entries) is implicitly asser-

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* In New York, landlords are normally allowed increased rent in specified amounts for making specified installations. See, e.g., New York City Rent Control Regulations §33.1 (at 65 McKinney's Unconsolidated Laws after § 8617); N.Y.S. Rent Administrator, Operational Bulletin No. C-15 and Supplement 10 thereto at Rasch, New York Landlord and Tenant, Rent Control 617 (1971) (increases for installing bell and buzzer systems and mail boxes and for permitting tenants to install outside antennas or to use antennas installed by landlords), and analogous Rent Administrator Orders at Rasch, op. cit., 551, 568, 575 and 579.

tive of adverse ownership. Michelman, op. cit., 80 Harv. L. Rev. at 1229n Further justifications for the per se rule are set forth throughout Point I of Appellant's Main Brief.*

2. "Use-Dependency" Cannot Justify a Retroactive Deprivation of Property Rights

Teleprompter is incorrect in suggesting that New York may, in effect, treat the operation of existing rental buildings as being pursuant to a license which the legislature may revoke if the owner refuses to dedicate an easement for installation of cable television lines (TPT Br. 28).

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* See also Michelman, op. cit., 80 Harv. L. Rev. at 1228, suggesting that a per se rule is in part justifiable by recognition that physical occupation presents "the stark spectacle of an alien, uninvited presence in one's territory" and that "[t]he psychological shock, the emotional protest, the symbolic threat to all property and security, may be expected to reach their highest pitch when government is an unabashed invader."

Teleprompter misplaces its reliance on cases which require property owners to dedicate portions of their land for highway or park purposes as a precondition to the granting of a permit for subdivision or new construction which would impose particularly heavily on municipal services.*

These cases all rest upon the premise that the particular permit being sought is for the privilege of doing something with the land which the owner previously had no vested right to do. See Frisco Land & Mining Co. v. State, 74 Cal. App. 3d 736, 141 Cal. Rptr. 820 (1977), cert. denied, 436 U.S. 918 (1978); Associated Home Builders etc., Inc. v. City of Walnut Creek, 4 Cal. 3rd 633, 94 Cal. Rptr. 630, 484 P.2d 606

* See, e.g., Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965), app. dism'd, 385 U.S. 4 (1966); Frisco Land & Mining Co. v. State, supra.

(1971); 4 Anderson, American Law of Zoning § 2304 (1977). In this sense, the superficial appearance in these cases of a mandatory exaction by government turns out to be illusory. The property owner in these cases is seeking a privilege which will benefit him beyond any as-of-right usage and so, if he agrees to a reasonable request of the government as a quid pro quo, he is doing so voluntarily. See Ayres v. City Council of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1, 8 (1949).

The present case, however, involves (at least primarily) existing uses, in the continuation of which owners have a vested right.* See 1 Anderson, American

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* Section 828 does not purport on its face to apply only to new construction or new usage and has not been so interpreted by the New York Court of Appeals, nor have Appellees suggested such an interpretation. Moreover, limiting its application to new construction would generate the constitutional problem

(Footnote continued on next page)

Law of Zoning § 6.06 (1976). The exaction of Section 828 (if contortiously read as a statute which licenses owners to rent out facilities on condition that they agree to a dedication of an easement) is not illusory but very real. The property owner is seeking nothing from the State which he does not already have a right to do. If the State insists upon the dedication of an easement as a condition of the owner continuing to do what he presently has a right to do, then the

(Footnote continued from preceding page)

suggested by the next paragraph of the text (pages 32-33, infra): unlike a subdivision dedication requirement, where one would expect that subdivision would seldom be the only practical use of the land so that the owner's acquiescence to the dedication conditions is truly voluntary, the rental of property is so common and, indeed, the right to do so perhaps so essential a component of the concept of "property," that exacting a dedication of an easement as a condition to "permitting" rental may well constitute a taking. See Brown, The Law of Real Property 6-7 (2d ed. 1955).

State has, as a practical matter, forcibly exacted an easement.

Section 828 not only affects vested rights to utilize property for rental purposes but also (if interpreted as conditioning a license to rent) would commonly impose an element of economic coercion not present in the cases approving subdivision dedication requirements. The owner of property zoned for multi-family residential use (as is extremely common in New York City) would have little or no practical economic alternative but to operate the property as a rental property and, therefore, to "dedicate" the easement exacted by Section 828. See Baker v. Board of Zoning Appeals, 67 App. Div.2d 1071, 413 N.Y.S. 2d 782 (3rd Dep't 1979). In such a situation of economic coercion, we submit that a taking would have to be

found. See Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 593 (1926) (state may not condition private carrier's use of public highways upon carrier assuming burdens and duties of a common carrier).

Moreover, as to crossovers, the easement exacted by Section 828 goes beyond the needs created by the individual owner's decision to rent out space. The volume of cable, amplifiers and other equipment installed on a particular owner's roof (located, let us suppose, atop a single rental unit building) would be primarily a function of the demand of tenants elsewhere around the block. Thus, Section 828 is analogous to requiring the subdivider of a small parcel to dedicate land for the creation of a superhighway, a requirement of doubtful constitutionality. Pioneer Trust & Sav-

ings Bank v. Village of Mount Prospect, 22 Ill.2d 375, 176 N.E.2d 799, 801 (1961).

In reality, Section 828 is far more analogous to decisions of this Court prohibiting imposition of improper conditions upon licensees than it is to the cases sanctioning subdivision dedications. As a general proposition, this Court has held that a State may not "strip the citizen of rights guaranteed by the federal Constitution . . . under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold." Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 593 (1926). Thus, in particular, a city may not require a telegraph company to permit free use by the city of the top cross-arm of each of the company's poles for the

city's own telegraph purposes as a condition to authorizing continued use by the telegraph company of city streets to maintain existing poles. St. Louis v. Western Union Telegraph Co., 148 U.S. 92, 102-4 (1893).* See also Railroad Commission Cases, 116 U.S. 307, 331 ("Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward. . . ."); Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) (state modification of corporate charter prohibited).

If building owners may rent space only by virtue of a privilege to do so

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* Board of Public Utility Commissioners v. Ynchausti & Co., 251 U.S. 401 (1920) (Philippine government may condition license for vessels to carry on coastwise trade upon their carrying mail free) is not inconsistent as the holding depended upon the fact that such a condition had been imposed continuously during and since Spanish dominion.

granted by the State, then the condition imposed by Section 828 that the landlord effectively dedicate space to the use of cable television companies for signal transmission is precisely analogous to the cross-arm dedication requirement in St. Louis v. Western Union Telegraph Co., supra.

3. Telephone and Electric Line Cases Establish That "Use-Dependency" Cannot Validate Section 828

The weakness of Teleprompter's effort to validate Section 828 by reference to a "use-dependency" theory is illustrated by Teleprompter's effort to distinguish the present case from what it calls a "true" taking, the latter being a case where "government, in fulfillment of public ends, takes property qua property, regardless of the use to which the owner has chosen to put it" (TPT Br. 23). Teleprompter's own examples illustrate

the fallacy of the distinction. In particular, Teleprompter suggests that "when a telephone company installs poles across land, each land owner is affected by the installation of the poles, regardless of the use to which he has put his property" (TPT Br. 33).

But the telephone line is precisely analogous to the block-circuit cable television line. Both systems serve the dual function of conveying a signal across numerous properties and of servicing properties which they traverse along the way. There is no question that the telephone company's use of property for installation of such a system constitutes a taking requiring compensation (see St. Louis v. Western Union Telegraph Co., 148 U.S. 92 (1893); Western Union Telegraph Co. v. Pennsylvania Railroad Co., 195 U.S. 540 (1904); and cases cited

at pp. 28-33 of Appellant's Main Brief).* Certainly, under normal circumstances (for example, in a suburban neighborhood where a telephone line runs down a block of private residences), the properties traversed are used in such a manner as to require (or potentially require) the use of telephone service. Yet no court to our knowledge has ever sought to draw a distinction between telephone lines which

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* Teleprompter inaccurately describes City v. Comtel, Inc., 57 Misc. 2d 585, 293 N.Y.S.2d 599 (Sup. Ct. N.Y. Co. 1968), aff'd, 30 A.D. 2d 1049, 294 N.Y.S.2d 981 (1st Dep't 1968), aff'd, 25 N.Y.2d 904, 252 N.E.2d 285, 304 N.Y.S.2d 853 (1969), as upholding "the right of a state-licensed cable television company to use city streets over the objection of the city government" (TPT Br. 21). Comtel actually holds that the cable television company's use of telephone wires in conduits which the City had already licensed the telephone company to install imposes no additional burden on the City and falls within the telephone company license. Cf. Eels v. Telephone and Telegraph Co., 143 N.Y. 133 (1894) (holding that use of a highway right-of-way for communication wires required additional compensation because the new use was not within the original grant).

provide service to properties they traverse and telephone lines which do not; the installation of either variety is an act of eminent domain requiring compensation.

CONCLUSION

The decision of the Court of Appeals should be reversed and the case remanded for assessment of damages.

Dated: New York, New York
March 16, 1982

Respectfully submitted,

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No. 81-244

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JEAN LORETTO, on behalf of herself and all others similarly situated,

Appellant,

v.

TELEPROMPTER MANHATTAN CATV, CORP., TELEPROMPTER CORPORATION and CITY OF NEW YORK,

Appellees.

On Appeal From The Court Of Appeals Of New York

BRIEF AMICUS CURIAE OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC. IN SUPPORT OF THE APPELLEES

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

Did the New York Court of Appeals correctly hold that Section 828 of the Executive Law of the State of New York is a valid constitutional exercise of the state's police power?

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BRIEF AMICUS CURIAE OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC. IN SUPPORT OF THE APPELLEES

INTRODUCTION AND SUMMARY OF ARGUMENT

Cable television is a mushrooming communications service. From its early years when it merely served as a master antenna system providing television signals to communities where few were viewable off-the-air, cable has become the provider of numerous and diverse services such as local origination and access programming, data transmissions and security systems. [1] Development of these new services, and the promise of more to come, makes cable television an attractive service even in communities, such as those in major metropolitan areas, where

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[1] A comprehensive list of services available *via* cable television systems is set out in the Appendix.

off-the-air television reception is not limited. New York, along with the federal government and many other state and local governments, has determined that widespread availability of cable television services promotes the public interest.

Construction of cable television systems is a high risk, capital intensive business. It is particularly costly in urban areas where commonly the system plant must be buried underground. Economic justification for this enormous capital outlay rests on projections of potential subscriber revenues over the term of the system franchise, which is typically fifteen years. If access to high density apartment buildings is denied, the cable system operator will be deprived of significant portions of those anticipated revenues. The economic feasibility of the cable system and the scope of its future services is also jeopardized where access to subscribers is conditioned upon payment of exhorbitant fees to the landlord. This harsh economic reality reflects the fact that cable systems provide important, but nonessential services in a competitive marketplace. Some costs may be passed along to subscribers in the form of higher fees, as was noted by the Court below. But at some point, in view of the availability of alternative services in the marketplace, subscriber fees cannot be readily adjusted to compensate fully for revenue drains occasioned by excessive payments to landlords or others.

Landlords, absent legislation, moreover, may unilaterally control the availability of cable television service, either by extracting prohibitive and unreasonable fees from the cable operator or by precluding access to their buildings and tenants entirely. They are, thus, empowered to effectively override the decision of the municipal franchising authority that cable service be made available to all community residents, including apartment dwellers. As the New York Court of Appeals noted in the decision below, "landlord impediment to the extension of CATV service is disadvantageous not only to the personal

interests of tenants, but to the development of the CATV industry."[2]

Admittedly, cable television service is not an essential service to the home such as are the provision of electricity or water, or even telephone service. Nonetheless, there exists a strong public interest in making it available to as many people as possible. From its inception, cable television has played an increasingly important role in developing a nationwide communications service. In the past, recognition of the need to foster cable's participation in implementing overall communications policy has necessitated government action to reduce or eliminate impediments that frustrated delivery of cable service.

For example, in 1974, the Federal Communications Commission (FCC) preempted local regulation of rates charged for "premium" or special cable television services in order to eliminate the impediment to their development. After studying the cable television industry and its prospects for providing new and innovative communications services, the FCC concluded,

> . . . there should be no regulation of rates for such services at all by any governmental level. Attempting to impose rate regulation on specialized services . . . would in all likelihood have a chilling effect on the anticipated development.[3]

Similarly, the FCC acted to prohibit telephone companies from furnishing cable television service within their telephone service areas. The Court, in affirming the action, noted the

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[2] Jurisdictional Statement of Appellant, Appendix at 32 (filed August 3, 1981). Hereinafter cited as "JS, A."

[3] Clarification of the Cable Television Rules, 46 F.C.C.2d 175, 199-200 (1974). The FCC's action was upheld on appeal in Brookhaven Cable TV v. Kelly, 573 F.2d (2d Cir. 1978).

FCC's obligation to develop cable television service as part of the nationwide communications system and stated,

> The Commission is obliged to discharge its responsibilities in this area as best it can and it has chosen in this instance to implement the national policy by limiting the involvement of common carriers . . . in CATV operations.[4]

In the matter now before the Court, the New York Legislature recognized that gouging and other arbitrary actions by landlords were an impediment to the extension of cable service to the public.[5] New York Executive Law Section 828 (Section 828) is an exercise of the New York Legislature designed to prevent landlords from arbitrarily impeding the provision of cable television services. It is a valid exercise of the State's police power which assures that the public interest in promoting the widespread availability of cable television service is not impaired.

INTEREST OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

The National Cable Television Association, Inc. (NCTA) is a nonprofit trade association representing the majority of cable television operators throughout the United States. Its membership is comprised of approximately 430 cable television companies, including Appellee, Teleprompter Corporation, and about 1,755 cable television systems. NCTA's member systems provide service to approximately 14.5 million of the

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[4] General Telephone Co. of Southwest v. United States, 449 F.2d 846 (5th Cir. 1971).

[5] The Court below noted, "As you may know, landlords in many instances have imposed extremely onerous fees and conditions *on cable access to their buildings*," quoting the testimony of Joseph C. Swidler, Chairman of the New York Public Service Commission, before the Joint Legislative Committee considering the adopting of cable television legislation. JS, A at 33.

19.1 million subscribers to cable television. NCTA is an *amicus curiae* by consent of the parties (signed consent of the parties are on file with the Clerk of the Court). NCTA did not previously participate in this case.

NCTA's interest in this proceeding is simply stated: Absent Section 828, landlords have the capacity to unilaterally impede the provision of cable television service to the public either by arbitrarily refusing cable access to apartments or by extracting monopoly charges in exchange. Such a situation significantly impairs the ability of the cable television industry to continue providing services found to foster the public interest. Absent Section 828, New York landlords are, in effect, "bottlenecks," absolutely controlling the provision of cable television service to their tenants. Section 828 assures that landlords will not be able to use their position to frustrate the State's public policy of making the benefits of cable television service available to all, including apartment house tenants.

The Court's resolution of this matter will have implications for NCTA's members nationwide as well. State laws and municipal ordinances designed for purposes similar to those that led to enactment of Section 828 have been adopted elsewhere in the country, particularly as cable service expands into urban areas where a significant percentage of the population resides in apartment dwellings. Continued development of cable television and the availability of the services it provides is dependent, to a large degree, upon a determination that Section 828 and laws similar to it constitute a valid exercise of the state's police power.

NCTA supports the Appellees in their contention that the decision of the New York Court of Appeals, holding that Section 828 is a valid exercise of the State's police power, was correct and should be affirmed by this Court.

STATEMENT OF THE CASE

In 1972, the New York State Legislature enacted Section 828 of the Executive Law in conjunction with its regulatory scheme effectuating the provision of cable television within the state. Section 828 prohibits landlords from interfering with the installation of cable television facilities upon their property subject to conditions that ensure safety of the landlord's premises, that require the entire cost of installation be borne by the cable television company or tenant, and that provide for indemnification for any damages caused by the installation. Section 828 further prohibits landlords from obtaining any payments from the cable television company in excess of those set by the New York State Cable Television Commission in exchange for permitting cable television service.

Loretto, a New York City landlord, alleged that installation of cable facilities by the cable television company, Teleprompter, on her apartment building constituted a trespass. Teleprompter denied the allegation and asserted Section 828 as an affirmative defense. The lower courts of New York ruled in favor of Teleprompter holding that Section 828 is a reasonable and justifiable exercise of the State's police power. Loretto appealed to the New York State Court of Appeals which affirmed the decision.

The New York Court of Appeals found that Section 828 is a valid police power statute justified upon the legislature's power both to regulate landlord-tenant relationships and to encourage development of an educational and communications medium. It held, too, that Section 828 does not constitute a "taking" of property because of the *de minimus* nature — both of the space on the apartment occupied by Teleprompter's cable and the economic damage inflicted.

Loretto alleges to this Court that the decision of the New York Court of Appeals is incorrect. Loretto asserts that Section

828 is unconstitutional because it authorizes a taking of private property without providing for just compensation and urges that the decision of the New York Court of Appeals be reversed.

ARGUMENT

I. Section 828 Is A Valid Exercise Of The State's Police Power.

A. *Section 828 Is A Police Power Statute*

The police power of a state comfortably includes legislative action such as Section 828. "Police power" is an attribute of sovereignty which refers to the government's ability to impose restrictions and prohibitions on the use of private property without payment of compensation.[6] The precise meaning and scope of this broadly defined term is dictated by the facts of each case.[7]

> The definition is essentially the product of legislative determination addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition.[8]

Traditionally, the police power is said to be used to protect the public safety, health, morality, peace and quiet, and law and order.[9] It has taken the form of fire regulations,[10] garbage disposal control,[11] and restrictions on prostitution[12] and liquor.[13] Yet, it has never been suggested that the police power

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[6] Munn v. Illinois, 94 U.S. 113 (1876).

[7] Berman v. Parker, 348 U.S. 26, 32 (1954).

[8] *Id.*

[9] *Id.*

[10] Munn, *supra*.

[11] Gardner v. Michigan, 199 U.S. 325 (1905).

[12] L'Hote v. City of New Orleans, 177 U.S. 578 (1900).

[13] Boston Beer Co. v. Massachusetts, 97 U.S. 25 (1878).

is limited to these conspicuous uses. Instead, they "merely illustrate the scope of the power and do not delimit it." [14]

The police power, therefore, extends to a variety of peculiar needs of the community. It may include legislation to increase the industries of the state, develop its resources, and add to its welfare and prosperity. [15]

> The concept of public welfare is broad and inclusive . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. [16]

Although the police power is to be given broad definition it, nevertheless, is not limitless. No specific criteria have been established for judging police power actions except that they must be reasonable. [17] Reasonable police power actions are those that are not unduly oppressive, [18] serve a valid public interest purpose and employ appropriate means to achieve the purpose. [19]

The New York State Legislature exercised its police power in enacting Section 828. Through Section 828, the legislature sought to promote the general welfare of the public while only minimally restricting the rights of landlords. Its action is consistent with the established body of law affirming the legislature's ability to exercise its police power. And,

> . . . when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive . . . This

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[14] Berman, *supra* at 32.

[15] Bayside Fish Flour Co. v. Gentry, 297 U.S. 422 (1936).

[16] Berman, *supra* at 33. *See also*, Day-Brite Lighting v. Missouri, 342 U.S. 421, 424 (1952).

[17] Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), and Nashville, C.& St. L. Railway v. Walters, 294 U.S. 405 (1935).

[18] Plessy v. Ferguson, 163 U.S. 537 (1896).

[19] Goldblatt, *supra* at 594-95.

> principle admits of no exception merely because the power of eminent domain is involved. [20]

B. *Section 828 Is A Valid Police Power Statute*

Section 828 meets the constitutional standards determinative of a valid police power enactment. The rule for testing the constitutional validity of a police power regulation was set out as follows in *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594-5 (1962):

> To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals.

Section 828 meets all parts of this test.

1. *Section 828 Was Enacted To Promote The Public Interest*

The first criteria of the test assessing the constitutional validity of a police power enactment is designed to determine whether the enactment furthers an interest which "is in fact public." [21] The legislative history of Section 828 makes clear the legislature's public interest intent.

In 1972, the New York Legislature enacted Article 28 of the Executive Law (Sections 811 *et seq.)* which became effective January 1, 1973. Section 811 declared that the purpose of the legislation was to assure "maximum penetration" of cable television service "as rapidly as economically and technically feasible" so that "municipalities and the State would benefit from valuable educational and public services through cable televi-

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[20] Berman, *supra* at 32.

[21] Treigle v. Acme Homestead Ass'n, 297 U.S. 189, 197 (1936).

sion systems" and because "the public and business community would benefit. . . ."[22] As the Court below noted,

> " 'after investigation of the public interest associated with cable television,' the Legislature has determined that CATV operations involve 'vital business and communications services' which must be protected from undue restraint and regulation so as to assure cable systems optimum technology and maximum penetration. . . ."[23]

The New York Legislature determined, further, that development of the cable television industry had been severely restricted by gouging and arbitrary action by landlords who were imposing onerous conditions and fees before permitting cable access to their buildings.[24] Section 828 of Article 28 was specifically designed to "assure that tenants have access to cable television on the same footing as . . . homeowners"[25] and "to prohibit gouging and arbitrary action."[26] Enactment of Section 828 was, thus, an exercise of the State's police power to promote a perceived public interest.

In *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the Court characterized "public interest" as including the public health, education, safety, morals and general welfare. The express legislative intent of Section 828, to promote the educational and public services offered by widespread provision of cable television, falls well within that broadly construed concept.

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[22] The important public interest in receiving cable television service also was recognized in two independent reports: Jones, Regulation of Cable Television by the State of New York (1970), and Report to the President of the Commission on Cable Communication (1974).

[23] JS, A at 18.

[24] JS, A at 41.

[25] Commission on Cable Television, Statement of General Policy, January 15, 1976, p. 2.

[26] JS, A at 33.

Indeed, cable television provides a plethora of services promoting the "public interest."[27] Signals of television broadcast stations, both commercial and educational, are retransmitted for subscribers' viewing. Access channels provide direct communications between subscribers and their government, their school system and other members of the public enabling community and educational information to be readily conveyed. Local cable originations provide entertainment, news, children's programming, political coverage, religious and cultural programming. And, cable systems often provide home security services offering burglar and fire protection, and data bank services which provide subscribers with access to thousands of pages of securities' and commodities' prices and market reports, as well as fast breaking news.

The "public interest" furthered by Section 828 conforms, as well, to the national public interest policy of promoting provision of cable television service as an integral part of the nation's communications system. Under its Congressional mandate, the FCC is charged with making available, "so far as possible, to all the people of the United States a rapid, efficient, nationwide, and world-wide wire and radio communication service."[28] The FCC recognized the "importance and promise of cable development" and, in 1972, adopted an extensive regulatory scheme intended to promote cable television as part of the nation's overall communications service.[29] Section 828 fosters this

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[27] *See* Appendix.

[28] 47 U.S.C. Sec. 151.

[29] *See* Cable Television Report and Order, 36 F.C.C.2d 143 (1972). *See also*, Clarification of Rules and Notice of Proposed Rulemaking, 46 F.C.C.2d 175, 176 (1974), wherein the FCC said:

> Our interest in the development of cable television is not passive . . . This Commission is primarily responsible for the development and maintenance of a nationwide communication system . . . Cable television is undeniably part of that system and presumably will become a major and integrally vital element of what many see as the broadband communications system of the future.

national public interest in that it ensures the local availability of cable television service to apartment dwellers within the State of New York.

In fact, the New York Legislature's public interest determinations in adopting Section 828 are analogous to those underlying federal regulatory policy concerning development of cable television services. As noted, *supra*, [30] limits have been imposed upon the local regulation of rates charged for "premium" cable services and on the provision of cable television services by telephone companies.

Finally, New York is not the only state to have determined that the availability of cable service is in the public interest. Ten other state legislatures have enacted regulatory schemes designed to promote the availability of cable television service. [31] Furthermore, at least three have adopted legislation similar to Section 828. [32] At the local level, moreover, virtually all communities negotiate cable franchise agreements designed to assure provision of those cable services considered to be of particular interest to the public of that community.

In sum, the promotion of cable television service is considered by the federal government, state governments and local governments to be, in fact, in the public interest. Section 828 is

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[30] *See* discussion at page 3, *supra*.

[31] States other than New York that regulate cable television are Alaska, Connecticut, Delaware, Hawaii, Massachusetts, Minnesota, Nevada, New Jersey, Rhode Island and Vermont.

[32] *See* Conn. Stats. Ann. Sec. 16-333(a); Mass. Gen. Laws Ann. Ch. 166A, Sec. 22; and Fla. Stat. Ch. 81-185, Sec. 16.

but one State's effort to assure that this public interest is well served. [33]

2. *Section 828 Employs Means Reasonably Calculated To Achieve Its Purpose*

Section 828 satifies, as well, the second part of the *Goldblatt* test in that the means employed to serve the public interest reasonably achieves the purpose of the statute. The absence of a reasonable nexus between a proper purpose and means for achieving it would be grounds for invalidation of the statute. [34] Certainly, however, there exists a clear relationship between Section 828's purpose to promote the availability of cable

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[33] The confirmed public interest in assuring availability of cable television service is analogous to the public interest in assuring the availability of conventional information sources. The decision below cites with approval the Jones Report, *supra*, statement to the New York Legislature that,

> In the electronic age, the landlord should not be able to preclude a tenant from obtaining CATV service (or to extract a surcharge for allowing the service) any more than he could preclude a tenant from receiving mail or telegrams directed to him. JS, A at 33.

The decision also notes that the Legislature has explicitly recognized television as a practical necessity of modern living. Cable television, moreover, often is characterized as an "electronic newspaper" which, like traditional newspapers, is an information source providing its subscribers with news and entertainment. Already, the courts have affirmatively made this comparison between cable television and newspapers, in terms of the comparable First Amendment protections afforded to providers of each. *See* Home Box Office, Inc. v. FCC, 567 F.2d 9, 46 (D.C. Cir.) *(per curiam), cert. denied*, 434 U.S. 829 (1977); Midwest Video Corp. v. FCC, 571 F.2d 1025, 1055 (8th Cir. 1978); *aff'd on other grounds*, 440 U.S. 689 (1979); *see also*, Community Communications Co. v. City of Boulder, Colorado, 630 F.2d 704, 713-14 (10th Cir. 1980) (Markey, C.J., dissenting), *rev'd*, No. 80-1350 (U.S., Jan. 13, 1982).

[34] Goldblatt, *supra* at 596. The availability of possible alternative means for achieving the statute's purpose, assuming they exist, would not provide a basis for its invalidation. PruneYard Shopping Center v. Robins, 447 U.S. 74, 85, n. 8 (1980).

television service, and its means, a prohibition against arbitrary interference in the provision of that service by landlords. Section 828 accomplishes its legislative intent by eliminating the demonstrated obstruction to the widespread provision of cable service posed by landlords. Prior to adoption of Section 828, landlords were able to absolutely dictate the terms under which their tenants would receive, if at all, cable television service. By virtue of their position, landlords could unilaterally refuse access to apartment buildings or demand exhorbitant payments in exchange for that access.

Accessability to apartment buildings is vital to the continued development of cable television. Cable television is an expensive, high risk venture, particularly in urban areas where construction costs are especially high. [35] Vast sums of capital are required for construction of any system long before the service is operational and the operator is able to begin to recoup that initial outlay of money. Initial economic feasibility projections, moreover, are predicated upon assumptions of likely subscriber penetrations and resultant revenue projections. Subsequent arbitrary exclusions of large numbers of potential subscribers living in apartments [36] would greatly skew the cable operator's ability to generate longterm minimum revenue requirements. Where access to apartments is predicated upon increased costs in the form of excessive payments to landlords, substantial increases in subscriber fees may result, making cable service

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[35] The cost of cable construction, of course, is dependent upon factors peculiar to the community where the cable system is to be located. Nevertheless, recent industry estimates indicate costs of approximately $13,000 per mile for construction of a suburban cable system built above ground and $20-$40,000 per mile for the same system if the cable is buried underground. In New York City and other major cities, underground costs may exceed $100,000 per mile.

[36] Apartment units comprise about 22 million or 32% of the total year round living units in urban areas. U.S. Bureau of Census, Housing Division, Annual Housing Survey (1978).

less attractive to the public. Alternatively, these unanticipated costs divert system resources that otherwise could be used for the provision of new and expanded cable services. Section 828 reasonably and effectively serves to eliminate this problem and thereby facilitates the availability of cable television service consonant with the legislative intent to do so.

3. *Section 828 Is Not Unduly Oppressive*

Finally, Section 828 is not unduly oppressive and, thus, comports with the third *Goldblatt* requirement. A regulation is so burdensome that it "becomes unconstitutional . . . if it frustrates the owner in the use of his property, that is, if it renders the property unsuitable for any reasonable income production or other private use for which it is adapted and thus destroys its economic value or all but a bare residue of its value."[37] The adverse impact, if any, resulting from implementation of Section 828, however, is nominal at most. The space on the apartment building occupied by the cable is negligible and would be otherwise unoccupied.[38] Nor is there any evidence of any kind that the presence of the cable renders Appellant's property unsuitable for any reasonable income production or otherwise damages the value of the property.

Furthermore, Section 828 does not interfere with the landlord's reasonable investment-backed expectations and, therefore, is distinguishable from the *Kaiser-Aetna* situation relied upon by Appellant.[39] In *Kaiser-Aetna* v. *United States*,[40] government action forced the opening to the public of the entire

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[37] Fred French Investing Co. v. City of New York, 39 N.Y.2d 587, 596 (1975), *app. dism'd* and *cert. den.*, 429 U.S. 990 (1976).

[38] The insignificance of its presence is exemplified by the fact that Appellant was unaware of the cable for sometime. JS, A at 15.

[39] Appellant's Brief at 21 (December 11, 1981).

[40] 444 U.S. 164 (1979).

recreational complex constructed by the property owners for the private use of their members. The result was a total loss of the expected return on their investment. By contrast, landlords do not invest in apartment houses in anticipation of earning profits from the provision of cable television service. Their only damage or "loss" resulting from the placement of a cable pursuant to Section 828, rather, arises from the resultant inability to extract windfall profits from cable operators. In fact, the availability of cable service to present or potential tenants is more likely to enhance the value of the landlord's property rather than to damage it.

Having met the three-pronged test of *Goldblatt*, Section 828 is seemingly a valid exercise of the State's police power.

II. Section 828 Is Not A "Taking" Statute.

Appellant's contention that Section 828 constitutes a "taking" requiring just compensation under the Fifth Amendment [41] is erroneous. In recent years, this Court has enunciated the factors determinative of whether legislation is an exercise of the state's police power or a "taking" requiring just compensation. A review of those decisions refutes the Appellant's mechanistic contention that every physical invasion of property constitute a "taking."

According to *Penn Central Trans. Co.* v. *City of New York*, [42] the question as to whether legislation is a taking or an exercise of police power is to be decided upon an "*ad hoc*" factual inquiry based upon the particular case. To make that determination, the Court noted the specific factors to be considered, beginning with "[t]he economic impact of the regulation on the claimant, and particularly, the extent to which the regulation

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[41] U.S. CONST. amend. *V*.

[42] 438 U.S. 104 (1978).

has interfered with distinct investment-backed expectations. . . ."[43] A "taking" is effected, the Court said, if the statute results in a "complete destruction" of the property or makes it "wholly useless."[44] If, however, it does not ". . . prevent the owner's reasonable use of the property . . .," there is no taking.[45]

The second factor to be considered is the character of the governmental action and the nature and extent of the interference to the property as a whole.

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this court focuses rather *both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole*. . . . (Emphasis supplied.)[46]

Therefore, while a physical invasion of property may be one indicia of a "taking," *Penn Central* makes clear that a more comprehensive examination of the government action is required.

Finally, the *Penn Central* Court said that takings and police power actions are distinguishable on the basis of whether they arbitrate disputes involving the rights of different parties or, instead, constitute an enterprise endeavor of the government. "Government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute 'takings.' "[47] Thus, where

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[43] *Id.* at 124.

[44] *Id.* at 127-28.

[45] *Id.*

[46] *Id.* at 130.

[47] *Id.* at 128, citing United States v. Causby, 328 U.S. 256 (1946).

direct overflights by military aircraft above the property owner's chicken farm destroyed its use, a taking was effected because the, "Government has not 'merely destroyed property [but was] using a part of it for the flight of its planes.' "[48]

When the factors enunciated in *Penn Central* are applied to the instant case, it is clear that Section 828 is not a compensable taking of property. The first element, economic impact, is totally missing. The value of Appellant's property has not been diminished and, in fact, may have been enhanced. Secondly, the nature of the interference to the property is *de minimus*. Indeed, use of the property would not be any different if the cable was not present. And finally, Section 828 resolves competing and conflicting interests in the same property, the apartment building, by mediating the dispute. The government here did not appropriate the property for an enterprise of its own. Thus, under the test enunciated by this Court in *Penn Central*, Section 828 is not a "taking."

Use of the *Penn Central* analysis for distinguishing between proper exercise of police power and an instance of "taking," moreover, was affirmed recently in *PruneYard Shopping Center* v. *Robins*.[49] Of significance here, that decision further held that a physical invasion of property is not determinative of the "taking" question.[50] In *PruneYard*, students wishing to distribute literature within a privately-owned shopping center were denied access by the property owners. Affirming the California Supreme Court's ruling that the students could not be denied access to the shopping center, the Court held that permitting them to enter clearly "does not amount to an unconstitutional infringement of appellant's property under the 'Taking

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[48] *Id.* at 128.

[49] *Supra*, at 83.

[50] *Id.* at 81.

Clause.' "[51] To determine whether the physical invasion amounted to a "taking," this Court said,

> It is, of course, well established that a State in the exercise of its police power may adopt reasonable restrictions on property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional question.[52]

It then proceeded to apply the test enunciated in *Penn Central*[53] and relied on the minimal economic effect of the student's entry on the owner's investment-backed expectations to conclude that no taking occurred.[54]

In the matter now before the Court, application of those same factors results in a finding that Section 828 amounts to a valid exercise of the State's police power. Such was the conclusion below:

> "Tested against the Supreme Court's factual inquiry criteria, Section 828 is a valid police power exercise and not a taking."[55]

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[51] *Id.* at 83.

[52] *Id.* at 81.

[53] *Id.* at 83 wherein it said,

> This examination entails inquiry into such factors as the character of the government action, its economic impact, and its interference with reasonable investment-backed expectations.

[54] *Id.* at 84.

[55] JS, A at 63.

CONCLUSION

Every state has by virtue of its police power the ability to enact legislation designed to promote the welfare and interest of its citizens. This power is broad in scope, limited only to the extent that its use must be reasonable, imposing no undue burden on any one particular class of people. The New York State Legislature determined that the public interest would be promoted by the widespread availability of the services, particularly educational and informational services, offered by cable television systems. This determination is consistent with similar findings of other state and local governments, and comports with federal communications policy.

Section 828 of the New York Executive Law constitutes a reasonable means for implementing the Legislature's effort in the public interest to promote the availability of cable television service. The law prohibits landlords from denying access to their apartment buildings by cable television systems. This assures that the great number of people living in those apartments are not precluded arbitrarily from receiving cable television service. Moreover, unimpeded access to those potential cable subscribers residing in apartment buildings, confirmed by Section 828, is of substantial economical import to the continued development and provision of cable television services. Yet, while Section 828 fosters the availability of cable television, its burden upon landlords is *de minimus*. Cable's physical intrusion upon the building does not interfere with its use by the landlord nor is the building's expected economic potential diminished thereby. Section 828, therefore, constitutes a valid exercise of the state's police power.

Appellant's contrary contention that Section 828 constitutes a taking is not correct. An allegation of a "taking," according to clear precedent established by this Court, requires an *ad hoc* examination of the facts particular to the case in light of the factors articulated in *Penn Central*. In this instance, the facts

clearly reveal that no "taking" has occurred because of the minimal economic impact occasioned by implementation of Section 828 and the absence of a situation in which a governmental appropriation of property for its own use is at issue.

Amicus respectfully requests this Court to affirm the decision of the New York Court of Appeals holding that Section 828 is a valid exercise of the state's police power.

Respectfully submitted,

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January 18, 1982

Appendix

ENHANCED SERVICES LIST

March 15, 1981

HOME SECURITY*

COMPANY/SERVICE AREA	SERVICES PROVIDED	START UP DATE	OPERATIONAL STATE: MARKETABLE, EXPERIMENTAL, OR PROJECTED	NO. OF SUBSCRIBERS (CURRENT/POTENTIAL) SYSTEMS OR MARKETS	COST TO SUBSCRIBERS MONTHLY INSTALLATION IF APPLICABLE)
Storer Altamonte Springs, FL	Home Security	Nov. 1980	Marketable	61 8,000 - market area 15,000 - potential	$700/installation $15.95/month
Omni Cable Conyers, GA	Home Security	Sept. 1980	Marketable	17 2,000 - potential	$500/installation $5.00/month
Sammons Park Cities, TX	Home Security	Jan. 1980	Marketable	510 11,500 - potential	$1,100/installation $16.95/month
Viacom Dayton, OH	Home Security	Jan. 1979	Marketable	956 60,000 - market area 70,000 - potential	$650/installation $16.95/installation
General Electric Cable Peoria, IL	Home Security	Nov. 1980	Marketable	30 1,100 - market area 70,000 - potential	$425/installation $15. /month
Rockport Cable Rockport, TX	Home Security	July 1980	Marketable	5 5,500 - potential	$16.95/month
Valparaiso, FL	Home Security	July 1980	Marketable	12 1,100 - potential	$750/installation $4.00/month

*Most information for this section is from Paul Kagan Associates Inc.'s Cable TV Security.

APPENDIX

COMPANY/SERVICE AREA	SERVICES PROVIDED	START UP DATE	OPERATIONAL STATE: MARKETABLE, EXPERIMENTAL, OR PROJECTED	NO. OF SUBSCRIBERS (CURRENT/POTENTIAL) SYSTEMS OR MARKETS	COST TO SUBSCRIBERS (MONTHLY INSTALLATION IF APPLICABLE)
Alnamalu Corporation Mainalo, HI	Home Security	March 1980	Marketable	70 2,000 - market area 12,000 - potentitol	$500/installation $17.95/month
Canadian Cablesystems Syracuse, NY	Smoke detector/police/ emergency medical button	Sept. 1980	Marketable	1,000 75,000 - potential	First year of operation free (to 1,000 homes: includes installation and monthly rate)
ATC Kansas City, MO	Medical alert/fire/security	August 1980	Marketable	5,000 - initial market area 180,000 - potential	NA
Vision Fort Lee, NJ	Fire/medical/security/ panic-hostage button	Fall 1980	Marketable	165 3,500 - market area 65,000 - potential	NA
Matrix Enterprises/New Trier Wilmette, IL	Home Security	Early 1981	Marketable	10,000 - potential	$300/installation $15.95/month
Selkirk Fort Lauderdale, FL	2 tiers of security	Feb. 1980	Marketable	632 (1/31/81) 70,000 - market area 110,000 - potential	$900/installation $15.95/month
Liberty Portland, OR	4 tiers of security	Nov. 1980	Marketable	160 800 - market area 100,000 - potential	$800/installation $18.00/month

COMPANY/SERVICE AREA	SERVICES PROVIDED	START UP DATE	OPERATIONAL STATE: MARKETABLE, EXPERIMENTAL, OR PROJECTED	NO. OF SUBSCRIBERS (CURRENT/POTENTIAL) SYSTEMS OR MARKETS	COST TO SUBSCRIBERS (MONTHLY INSTALLATION IF APPLICABLE)
Vision Clearwater, FL	Home Security	Fall 1980	Marketable	40,000 - potential	NA
Sammons Duncanville, TX	Home Security	NA	Projected	10,000 - potential	NA
Storer Dunedin, FL	Home Security	May 1981	Projected	16,000 - potential	NA
Hiall Communications Fitchburg, WI	Home Security	April 1981	Projected	5,000 - potential	NA
Storer Hallandale, FL	Home Security	April 1981	Projected	11,000 - potential	NA
Cox Cable Jacksonville Beach, FL	Home Security	Jan. 1981	Experimental	122 14,000 - potential	NA
Storer Kenton County, KY	Home Security	June 1981	Projected	48,000 - potential	NA
Telecable Lexington, KY	Home Security	May 1981	Projected	80,000 - potential	NA

COMPANY/SERVICE AREA	SERVICES PROVIDED	START UP DATE	OPERATIONAL STATE: MARKETABLE, EXPERIMENTAL, OR PROJECTED	NO. OF SUBSCRIBERS (CURRENT/POTENTIAL) SYSTEMS OR MARKETS	COST TO SUBSCRIBERS (MONTHLY INSTALLATION IF APPLICABLE)
ATC Littleton, CO	Home Security	June 1981	Projected	5,000 - potential	NA
Storer Miami Shores, FL	Home Security	June 1981	Projected	4,500 - potential	NA
Kingwood, TX	Home Security	1981	Marketable	100	$15.00/month
Kansas City, MO	Home Security	1981	Marketable	25	$17.00/month
Times Mirror Cable Mission Viejo, CA	Home Security	NA	Projected	10,000 - potential	NA
Viacom Cable Moreland, NC	Home Security	NA	Projected	15,000 - potential	NA
Cox Cable Norfolk/Virginia Beach, VA	Home Security	NA	Experimental	250,000 - potential	NA
Blackhawk Cable North Richland Hills, TX	Home Security	NA	Projected	35,000 - potential	NA
Continental Cable Overland, MO	Home Security	NA	Projected	12,000 - potential	NA

COMPANY/SERVICE AREA	SERVICES PROVIDED	START UP DATE	OPERATIONAL STATE: MARKETABLE, EXPERIMENTAL, OR PROJECTED	NO. OF SUBSCRIBERS (CURRENT/POTENTIAL) SYSTEMS OR MARKETS	COST TO SUBSCRIBERS (MONTHLY INSTALLATION IF APPLICABLE)
Centel Spring, TX	Home Security	NA	Projected	51,000 - potential	NA
Storer St. Louis County, MO	Home Security	NA	Projected	65,000 - potential	NA
American Cable Tempe, AZ	Home Security	NA	Projected	15,000 - potential	NA
Courier Cable Buffalo, NY	Home Security	June 1981	Projected	6,000 - market area	$500/installation $14-15.95/month
New Channels Dewitt, NY	Home Security	Sept. 1981	Experimental	NA	NA
Cablecasting Ltd. Atlanta, GA	Home Security	NA	Projected	200,000 - potential	NA
Telecable Arlington, TX	Home Security	NA	Projected	45,000 - potential	NA
United Cable Aurora, CO	Home Security	NA	Projected	15,000 - potential	NA

COMPANY/SERVICE AREA	SERVICES PROVIDED	START UP DATE	OPERATIONAL STATE: MARKETABLE, EXPERIMENTAL, OR PROJECTED	NO. OF SUBSCRIBERS (CURRENT/POTENTIAL) SYSTEMS OR MARKETS	COST TO SUBSCRIBERS (MONTHLY INSTALLATION IF APPLICABLE)
Storer Boone County, KY	Home Security	NA	Projected	14,000 - potential	NA
Omnicom Canton, MI area	Home Security	NA	Projected	100,000 - potential	NA
Storer Chesterfield County, VA	Home Security	NA	Projected	50,000 - potential	NA
Warner QUBE Columbus, OH	Burglar/fire/emergency medical/police	Dec. 1979	Marketable	2,506 (12/3/80) 15,000 - potential	$950/average installation $14.50/month
Warner QUBE III:					
Cincinnati, OH	Burglar/fire/emergency medical/police	Fall 1981	Projected	NA	NA
Houston, TX	Burglar/fire/emergency medical/police	Fall 1981	Projected	NA	NA
Farmers Branch, TX (Dallas area)	Burglar/fire/emergency medical/police	NA	NA	NA	NA

COMPANY/SERVICE AREA	SERVICES PROVIDED	START UP DATE	OPERATIONAL STATE: MARKETABLE, EXPERIMENTAL, OR PROJECTED	NO. OF SUBSCRIBERS (CURRENT/POTENTIAL) SYSTEMS OR MARKETS	COST TO SUBSCRIBERS (MONTHLY INSTALLATION IF APPLICABLE)
QUBE III (Continued)					
St. Louis, MO area	Burglar/fire/emergency medical/police	NA	Projected	NA	NA
Pittsburgh, PA	Burglar/fire/emergency medical/police	NA	Projected	NA	NA
TOCOM PUD's (Planned Unit Developments):				6,100 (total)	
The Woodlands, TX	Fire/medical/police	1974	Marketable	2,600	$10.00/month
Wynnoor Village/Coconut Creek, FL	Burglar/fire/emergency medical/police	1974	Marketable	3,000	$10-20/month
Las Colinas, TX	Burglar/fire/emergency medical/police	NA	NA	900	NA
Cocopium/Coral Gables, FL	Burglar/fire/emergency	NA	Projected	NA	NA
Wool River/Corpus Christi, TX	Home Security	1980	Marketable	100	$15.00/month
Oriole Homes/Del Ray, FL	Home Security	1980	Marketable	112	$15.00/month

COMPANY/SERVICE AREA	SERVICES PROVIDED	START-UP DATE	OPERATIONAL STATE: MARKETABLE, EXPERIMENTAL, OR PROJECTED	NO. OF SUBSCRIBERS (CURRENT/POTENTIAL) SYSTEMS OR MARKETS	COST TO SUBSCRIBERS (MONTHLY INSTALLATION IF APPLICABLE)
Westworth Village/Ft. Worth, TX	Home Security	NA	Projected	NA	NA
Glencairn Village/Houston, TX	Home Security	1980	Marketable	100	$15.00/month
Harbison, SC	Home Security	1976	Marketable	400	$15.00/month
Jonathan's Landing/Jupiter, FL	Home Security	1980	Marketable	175	$15.00/month
Palm-Aire/Pompano Beach, FL	Home Security	NA	Projected	NA	NA
Lakeside Village/Rockwall, TX	Home Security	NA	Projected	NA	NA
St. Charles, MD	Home Security	NA	Projected	NA	NA
PGA/West Palm Beach, FL	Home Security	April 1981	Projected	6,000 - potential	NA

COMPANY/SERVICE AREA	SERVICES PROVIDED	START UP DATE	OPERATIONAL STATE: MARKETABLE, EXPERIMENTAL, OR PROJECTED	NO. OF SUBSCRIBERS (CURRENT/POTENTIAL) SYSTEMS OR MARKETS	COST TO SUBSCRIBERS (MONTHLY INSTALLATION IF APPLICABLE)
TOCOM System Sales:					
Southern Cablevision Bryan/College Station, TX	Home Security	NA	Projected	NA	NA
Cox Azalea Trace, FL	Home Security	NA	Projected	NA	NA
Moffett Communications Kingwood, TX	Home Security	Feb. 1981	Marketable	100	$15.00/month
Jones Inter-Cable Ken Caryl Ranch, CO	Home Security	Sept. 1981	Projected	NA	NA
Colony Miami Springs, FL	Home Security	Sept. 1981	Projected	4,500 - potential	NA
Control Communications	Home Security: one way systems using microprocessors				
Storer Midwest Club/Oak Brook, IL		NA	Experimental	240 - potential	NA

COMPANY/SERVICE AREA	SERVICES PROVIDED	START-UP DATE	OPERATIONAL STATE: MARKETABLE, EXPERIMENTAL, OR PROJECTED	NO. OF SUBSCRIBERS (CURRENT/POTENTIAL) SYSTEMS OR MARKETS	COST TO SUBSCRIBERS (MONTHLY INSTALLATION IF APPLICABLE)
Massillon Cable Massillon, OH	Emergency alert-interrupting ongoing programs by overriding audio and video	May 1980	Marketable	18,000	NA
Madison, IL	Home Security	April 1981	Projected (Future system will provide security service - please see note below)	2,200 - potential	NA

NOTE: Page 3 of the January 21, 1981 issue of Cable TV Security: "Currently, 400 senior citizens have security systems linked by phone lines to the police station, but Southwestern Bell leased line charged have risen from $2 in 1975 to $12.50/mo. and are now scheduled to go to $21.50/mo. 'That's why we are switching over to cable,' said Mike Masik, the architect of the city's cable plan. Total cost of the system is expected to be $500,000."

ELECTRONIC NEWSPAPERS

COMPANY/SERVICE AREA	SERVICES PROVIDED	START UP DATE	OPERATIONAL STATE: MARKETABLE, EXPERIMENTAL, OR PROJECTED	NO. OF SUBSCRIBERS (CURRENT/POTENTIAL) SYSTEMS OR MARKETS	COST TO SUBSCRIBERS (MONTHLY INSTALLATION IF APPLICABLE)
Home Link Communications	Electronic newspaper	NA	Marketable	8,600 - potential	$4.00/basic cable $10.00/interface terminals $5.00/interactive data terminal
ATC Eau Claire, WI	Electronic newspaper	Jan. 7, 1981	Marketable	20,000 75,000 - market area	NA
Murray Cablevision Murray, KY	Murray Cable News Murray Ledger Times	Nov. 1979	Marketable	NA	NA
Sammons Cable Park Cities, TX	Electronic news	Oct. 1980	Marketable	70	$10.00/month expenses next few months No charge for Dallas
Teleprompter Danbury, CT	Electronic news	1980	Marketable	23,500 in 7 communities	NA
Mission Cable San Diego, CA	Electronic news	Late 1981	Experimental	200 - 300	NA
Courier Cable Buffalo, NY	Electronic news	NA	Experimental	50,000	NA

*Electronic newspaper involves alpha-numeric carriage of news articles and classified ads.

COMPANY/SERVICE AREA	SERVICES PROVIDED	START UP DATE	OPERATIONAL STATE: MARKETABLE, EXPERIMENTAL, OR PROJECTED	NO. OF SUBSCRIBERS (CURRENT/POTENTIAL) SYSTEMS OR MARKETS	COST TO SUBSCRIBERS (MONTHLY INSTALLATION IF APPLICABLE)
Compuserv Warner QUBE Columbus, OH	11 newspapers	NA	Experimental	32,000	NA
Yuma, AZ	Daily Sun on four channels	April 1980	Marketable	3,500	Service included with basic ($8.75/month)
Courier Cable Ottumwa, IA	Ottumwa Courier Mason City Globe Gazette	NA	NA	NA	NA
Troy Cable Troy, OH	The Daily News on 3 channels	Spring 1980	Marketable	NA	NA
R/G Cable (Camelback Cablevision Mesa Cable TV) Phoenix, AZ	Arizona Republic Phoenix Gazette One wire service	Sept. 1981	Projected	NA	NA

COMPANY/SERVICE AREA	SERVICES PROVIDED	START UP DATE	OPERATIONAL STATE: MARKETABLE, EXPERIMENTAL, OR PROJECTED	NO. OF SUBSCRIBERS (CURRENT/POTENTIAL) SYSTEMS OR MARKETS	COST TO SUBSCRIBERS (MONTHLY INSTALLATION IF APPLICABLE)
ENERGY MANAGEMENT/METER READING					
Warner Amex Wenne, OR	Energy Management	Feb. 1980	Marketable	96	Approx. $5.00/month
	Meter Reading	NA	Experimental	96	NA
TRAFFIC LIGHT CONTROL					
ARTEC Arlington, VA	2-way traffic light control to alter the junction of the traffic light by computer so the traffic light can change traffic flow	Summer 1981	Experimental	210 traffic light centers can be controlled	NA
Telecable Overland Park, KS	2-way traffic light control	Early '70's	Marketable	Approx. 55 traffic lights	NA

HOME SHOPPING

COMPANY/SERVICE AREA	SERVICES PROVIDED	START-UP DATE	OPERATIONAL STATE: MARKETABLE, E(PERIMENTAL, OR PROJECTED	NO. OF SUBSCRIBERS (CURRENT/POTENTIAL) SYSTEMS OR MARKETS	COST TO SUBSCRIBERS (MONTHLY INSTALLATION IF APPLICABLE)
Modern Satellite Network	Home shopping catalogue sales (The Home Shopping Show)	1980	Marketable	2,800,000	No Charge
Mission Cable San Diego, CA	Home shopping catalogue sales	Sept. 16, 198	Marketable	280,000	NA
Compucard Times Mirror Springfield, IL Louisville, KY Newark, OH Midland, TX Hartford, CT Orange County, CA	Satellite-delivered shop-at-home shopping channel	April 1981	Projected	150,000 - potential	No charge for program; but must join to get price information
Great Image American Teleshopping Network Nassau Cablevision Long Island, NY	Home shopping catalogue sales	Fall 1981	Projected	NY, LA, SF	NA

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INFORMATION RETRIEVAL					
Cablecasting Ltd. Atlanta, GA	Bibliographic reference data base - library access	Spring 1980	Experimental	NA	NA
OPINION POLLING					
Mission Cable San Diego, CA	Interactive opinion polling	1981	Experimental	100 - 300	NA
Warner QUBE Columbus, OH	Interactive opinion polling	1977	Marketable	32,000 (11/80)	NA

COMPANY/SERVICE AREA	SERVICES PROVIDED	START UP DATE	OPERATIONAL STATE: MARKETABLE, EXPERIMENTAL, OR PROJECTED	NO. OF SUBSCRIBERS (CURRENT/POTENTIAL) SYSTEMS OR MARKETS	COST TO SUBSCRIBERS (MONTHLY INSTALLATION IF APPLICABLE)
HOME BANKING					
Mission Cable San Diego, CA	Home banking/bill paying electronic fund transfer	1981	Experimental	100 - 300	NA
Warner Amex QUBE Columbus, OH	Home banking/bill paying	NA	Experimental	32,000	NA
STOCK REPORTS					
Sammons Communications Park Cities, TX	Stock news: Dow Jones & Merrill Lynch	Oct. 1980	Marketable	24	$7.5-$12.5/month, depending on computer available
Manhattan Cable New York, NY	Stock news: Wall Street Stock Exchange	NA	Marketable	121,000	Part of basic service

COMPANY/SERVICE AREA	SERVICES PROVIDED	START UP DATE	OPERATIONAL STATE: MARKETABLE, EXPERIMENTAL, OR PROJECTED	NO. OF SUBSCRIBERS (CURRENT/POTENTIAL) SYSTEMS OR MARKETS	COST TO SUBSCRIBERS (MONTHLY INSTALLATION IF APPLICABLE)
VIDEOTEX					
Times Mirror	Videotex - Antiope (information retrieval)	May or June 1981	Experimental	NA	NA
TELETEXT					
Time Inc. Video Group	Teletext	Late 1981	Experimental (ATC systems)	NA	NA

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No. 81-244

IN THE

Supreme Court of the United States

October Term, 1981

JEAN LORETTO, on behalf of herself and all others similarly situated,

Appellant,

against

TELEPROMPTER MANHATTAN CATV CORP., TELEPROMPTER CORPORATION and CITY OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

Brief *Amicus Curiae* of the Attorney General of the State of New York

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Question Presented.

Where the State finds it in the public interest to encourage the development of cable television as an educational and communications medium and finds that such development is being impeded by landlords who are precluding tenants from obtaining cable television service or imposing onerous fees and conditions for access to their building, may the State, in the exercise of its police power, proscribe a trespass action by landlords against a cable television company which places a cable or other fixtures on the landlord's property?

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ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

Brief *Amicus Curiae* of the Attorney General of the State of New York.

Interest of *Amicus Curiae.*

The Attorney General submits this *amicus curiae* brief pursuant to Rule 36(4) of the Rules of this Court in support of the constitutionality of section 828 of the New York State Executive Law, challenged by appellant on this

appeal.* The Attorney General had heretofore, pursuant to New York Executive Law, § 71, submitted a brief below to the Court of Appeals of the State of New York and argued in that Court in support of the constitutionality of section 828 of the Executive Law (JSi-ii).**

Summary of Argument.

During the 20-year period prior to 1972, many landlords were refusing to permit cable television companies from installing their facilities on the landlords' buildings, insisting that negligible unoccupied space remain unoccupied (JSA32, 33). Many other landlords were imposing extremely onerous fees and conditions on cable television companies before permitting cable access to their buildings (JSA33).

The Legislature of the State of New York determined that cable television operations involved vital business and communication services and that the State would benefit from valuable educational and public services through cable television systems (JSA28, 29). Landlords were depriving tenants of access to cable television, preventing the development of the cable television industry and prohibiting the delivery of adequate, economical and efficient service to subscribers (JSA33). In 1972, the Legislature enacted Article 28 of the Executive Law (L 1972, ch 466, eff. Jan. 1, 1973) creating the Commission on Cable Television, whose duty, among other things, was to develop and maintain a Statewide plan for development of cable television services in accordance with the declaration of legislative findings and intent (JSA29). Section 828 of the Executive Law challenged by appellant on this appeal was enacted as part of Article 28.

*Full text of Executive Law, § 828 is attached as an Appendix, pp 1a-2a.

**JS refers to Jurisdictional Statement. JSA refers to the Appendix to the Jurisdictional Statement.

Section 828 provides that no landlord shall interfere with the installation of cable television facilities upon his property; no landlord shall demand or accept payment from any tenant in exchange for permitting cable television services; no landlord shall demand payment from any cable television company in excess of any amount which the Commission shall, by regulation, determine to be reasonable.

The statute has revised the common law of trespass by prohibiting a trespass action by a landlord against a cable TV company which places its equipment on the landlord's building.

Application of the factors enumerated by this Court in *PruneYard Shopping Center v. Robins,* 447 US 74, 83 (1980), demonstrates that there has been no "taking" of the appellant's property "in the constitutional sense."

The State takes nothing for itself as entrepreneur but acts as arbiter.

The invasion of the premises by the installation of the cable television equipment is minimal; the landlord has no use for the area occupied by the equipment; the equipment rather than destroy or impair value actually increases the value of the premises; the value of the invasion or "easement" is nominal and there is no severance damage to the remainder.

There is no showing of any investment made in the expectation that fees would be derived from the cable television installations separate and apart from the basic rent paid by the tenant.

ARGUMENT.

Executive Law, § 828 which proscribes a trespass action by landlords against cable TV companies for placing their equipment upon the landlords' buildings is a valid exercise of the state's police power to regulate landlord-tenant relations and to promote an educational and communications medium.

In upholding the constitutionality of Executive Law, § 828, the Court of Appeals summarized its opinion in the following words (JSA69):

> "* * * What [this opinion] holds is that the State may proscribe a trespass action by landlords generally against a cable TV company which places a cable and other fixtures on the roof of any landlord's building, in order to protect the right of the tenants of rental property, who will ultimately have to pay any charge a landlord is permitted to collect from the cable TV company, to obtain cable TV service in their respective apartments. The bases upon which the Legislature may do so are its power to regulate landlord-tenant relationships and its power to encourage development of an educational and communications medium."

The statute has revised in a very restricted area (landlord-tenant relations) the common law of trespass. That a state may constitutionally do so without violating the due process clause has long been settled. "We need not, therefore, elaborate the rule that the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object. See *Louis Pizitz Dry Goods Co. v. Yeldell,* 272 U. S. 112, 116; *New York Central R. Co. v. White,* 243 U. S. 188; *Mountain Timber Co. v.*

Washington, 243 U. S. 219; *Wilmington Mining Co. v. Fulton,* 205 U. S. 60, 74." *Silver v. Silver,* 280 US 117, 122 (1929).

More recently the rule has been affirmed in *PruneYard Shopping Center v. Robins,* 447 US 74, 93 (1980) (MARSHALL, J. concurring), as follows:

> "Appellants' claim in this case amounts to no less than a suggestion that the common law of trespass is not subject to revision by the State, notwithstanding the California Supreme Court's finding that state-created rights of expressive activity would be severely hindered if shopping centers were closed to expressive activities by members of the public. If accepted, that claim would represent a return to the era of *Lochner v. New York,* 198 U.S. 45 (1905), when commonlaw rights were also found immune from revision by State or Federal Government. Such an approach would freeze the common law as it has been constructed by the courts, perhaps at its 19th-century state of development. It would allow no room for change in response to changes in circumstance. The Due Process Clause does not require such a result."

The opinion went on to observe that absent a showing of necessity or provision for alternate remedy, there is a limitation on the authority to abolish "core" common-law rights. *Id.*, at 94. Both conditions are met in this case, assuming *arguendo* that a "core" common-law right is here involved.

Necessity.

Cable television companies are not public utility corporations like the New York Telephone Company which

are regulated by the Public Service Commission of the State of New York. If a tenant of a building desires telephone service and the landlord refuses to grant an easement to the telephone company to install the telephone line, the Public Service Commission would order the telephone company to proceed to acquire the easement by a condemnation proceeding (Public Service Law, § 98). But the same is not true with cable TV. Before passage of section 828, if a tenant requested cable TV service and the landlord refused to grant an easement for the installation thereof, neither the Public Service Commission nor any other State agency could compel the cable TV company to acquire the easement by a condemnation proceeding. Additionally, the only feasible *economic* way of providing cable TV service is by having distribution cable strung from house to house to make a circle encompassing all properties in a square block (JSA35).* If one owner in the square block prevents installation on his premises, as many landlords had done prior to enactment of the statute, the economic distribution is prevented.

Alternate Remedy.

The State program as administered by the Cable Commission, as the Court of Appeals noted (concurring opinion), provides an alternate remedy in that a landlord who complains of mere placement of the cable, without more, is limited to the nominal sum of one dollar, but a landlord who actually incurs damages or is restricted in the use to which he might put the property, will receive compensation commensurate with the greater injury (JSA75).

This Court should hold here as was held in *PruneYard* that even if a "core" common-law right is involved, there is alternate remedy. The statute is limited to the installation of cable TV facilities upon rental properties;

*Simon deposition of February 24, 1977, p 73 (attached as Appendix, p 3a).

landlords may impose such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises and the convenience and well-being of tenants; the cable television company bears the cost of installation, operation or removal of the facilities, and the landlord may require the cable television company to indemnify the landlord for any damage of loss of use caused by the installation, operation or removal of the facilities. There is no interference with the landlord's operation of the apartment house or impairment of ability to receive rental income therefrom. There has been no invasion of any personal sanctuary and no rights or privacy are implicated. *Id.*, at 94.

Regulation of the use of property by the exercise of the police power when the stated purpose is to promote the public welfare, even when the area of regulation is novel but required by the complex society we now live in, without payment of compensation has been repeatedly recognized. *Modjeska v. Berle,* 43 NY2d 468 app dsmd 439 US 809 (aesthetics—prohibition of advertising—signs and structures in parks); *Suffolk Outdoor Advertising v. Hulse,* 43 NY2d 483 app dsmd 439 US 808 (zoning for aesthetics—off-premises billboards); *Penn Central v. City of New York* 42 NY2d 324 affd 438 US 104 (landmark preservation); *Block v. Hirsh,* 256 US 135 (rent regulation); *Euclid v. Ambler Co.,* 272 US 365 (zoning). In such cases no compensation has been constitutionally required, yet here any landlord who can prove actual reduction in value or other damage is entitled to recover from the cable TV company.

The validity of the regulation of the use of the landlord's property must be judged in the light of the circumstances existing in 1972 when the statute was enacted and not on any ancient definition of what constitutes a common law trespass. As this Court held in *Euclid v. Ambler Co.,* 272 US 365, 386-387 (1926):

"Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analagous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise."

There is no Taking in the Constitutional Sense.

It is undeniable that one of the sticks in the bundle of property rights is the right to exclude others. *Kaiser-Aetna v. United States,* 444 US 164, 179-180 (1979). When there is literally a "taking" of that right as here to the extent that the State has prohibited a landlord from bringing an action in trespass against a cable TV company which has placed its equipment on the landlord's building, it is still necessary to decide whether such governmental action amounts to a " 'taking' in a constitutional sense." *Armstrong v. United States,* 364 US 40, 48 (1960).

> "[But] the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle it not a taking, because the aggregate must be viewed in its entirety." *Andrus v. Allard,* 444 US 51, 65-66 (1979).

Whether there is a "taking" in the constitutional sense depends on the character of the governmental action, its economic impact and its interference with reasonable investment-backed expectations. *PruneYard Shopping Center v. Robbins, supra.*

The Character of the Governmental Action.

The State has not "taken" the landlord's property (the right to exclude) in furtherance of any governmental program. What the State has done is regulate the landlord's use of his property so that in the use thereof, he does not deprive his tenant of the right to receive cable TV. The State is not in the business of operating cable TV systems. The State has not "taken" the landlord's "right to exclude" so that the State may install the equipment. The State has, however, "taken" a landlord's right to exclude the cable TV company from his property in order that cable TV operation will be developed rapidly and with maximum penetration as an educational and communications system in which tenants have every right to participate. Had landlords not been oppressive (refusing entry) or greedy (onerous fees), there would have been no need to enact the statute.

The record amply demonstrates the oppression and the greed. Cable TV was more than 20 years old at the time the statute was enacted. Joseph C. Swidler, Chairman of the New York State Public Service Commission, testified

before the Joint Legislative Committee concerning the cable TV bill and stated as follows:

> "As you may know, landlords in many instances have imposed extremely onerous fees and conditions *on cable access to their buildings.* Clearly, landlords should be allowed to impose conditions governing the safety and appearance of their property and to bear the full cost of installation and indemnification for damage. *Legislation is necessary, however, to prohibit* gouging and *arbitrary action.*" (Emphasis supplied, JSA33.)

William K. Jones, a Commissioner of the Public Service Commission, in his report to the Governor entitled "Regulation of Cable Television by the State of New York (1970)," in proposing the enactment of Article 28, stated that its purpose was to assure that tenants have access to cable television service on the same footing as do individual homeowners. His report stated, in part, as follows (pp 206-207):

> "[This] proposal involves some intrusion upon the property interest of the landlord. But the interest intruded upon is a wholly abstract one—given the conditions specified, the landlord's interest *consists entirely of insisting that some negligible unoccupied space remain unoccupied.* The tenant's interest clearly is more substantial, consisting of a right to receive (and perhaps send) communications from and to the outside world. In the electronic age, the landlord should not be able to preclude a tenant from obtaining CATV service (or to exact a surcharge for allowing the service) any more than he could preclude a tenant from receiving mail or telegrams directed to him." (Emphasis supplied; JSA32, 33.)

Economic Impact.

The economic impact upon the landlord's property is, at best, *de minimis* and as a matter of fact enhances the value of the premises (JA101-103)*. The landlord had no use for the space now occupied by the equipment (JA48). The "negligible unoccupied space [would] remain unoccupied" (JA48). The equipment does not destroy or impair the value but rather enhances the value (JA101-103). The New York State Commission on Cable Television obtained appraisals of the effect upon the market value of the property upon which cable television equipment would be placed. Two appraisals were submitted; one involving a small 5-apartment building and the other involving a 200-unit building (JA51). Both appraisals concluded that the value of the "easement" taken was nominal and that severance damages to the remainder were nonexistent (JA51). The statute in no way impairs the landlord's ability to receive a reasonable return on the property and does not in any way interfere with the expectation concerning the use of the property as an apartment building. The Court of Appeals in analyzing the economic impact concluded as follows (JSA57):

> "Here plaintiff Loretto makes no claim that she is not receiving a fair return from the property."

Investment-backed Expectations.

The landlord argues herein that, but for the statute (section 828), she would be able to receive as her "damages" for the alleged "taking," 5% of the revenue received by the cable television company from the tenants in her building. The Court of Appeals stated the landlord's argument as follows (JSA57):

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*JA refers to Joint Appendix.

> "What she is saying is that an area of the building for which she does not claim to have any other use may not be used for the benefit of her tenants because without the statute she would be able to obtain a fee from the CATV company, payable in last analysis by the tenant, for failing to exercise her common law right to exclude the CATV company from her property."

At the time of the landlord's deposition herein, which was taken on September 14, 1977, two tenants were subscribers to cable television from the appellee. In 1970 the appellee charged a customer a monthly charge of $5.00 which was increased in 1975 to $8.00.

The landlord, by virtue of the provisions of the statute, was thus unable to receive from the cable television company the sum of $6.00 per year during the period 1970 through 1975 and the sum of $9.60 per year after 1975. It is on this factual basis that the landlord argues herein that the statute is unconstitutional because it interferes with the property owner's reasonable investment-backed expectations under the test laid down in the *Kaiser-Aetna* case, *supra.*

The Court of Appeals has in this case held that the phrase "reasonable investment-backed expectations" refers not to overall investment in the property, but to investment made with a now frustrated particular purpose or expectation in mind (JSA61).

The landlord's property is described as a "townhouse" or "brownstone." It is five stories in height and contains nine apartments.* The building was purchased by Mrs. Loretto in 1971 for the sum of $135,000.** To argue now

*Loretto deposition of September 14, 1977, page 31 (attached as Appendix, p 5a).

**Loretto deposition of September 14, 1977, page 24 (attached as Appendix, p 4a).

that when the building was purchased, the investment was made in the expectation that the owner would receive $6.00 or $9.60 per year from the appellee is preposterous.*** The Court of Appeals rejected the landlord's argument of interference with reasonable investment-backed expectations in the following words (JSA62):

> "Here, as in *PruneYard,* there is no showing of any investment made in the expectation that fees would be derived from CATV installations separate and apart from the rent normally paid by the tenant. Such income as plaintiff and other property owners derived from CATV installations prior to enactment of Section 828 arose not from any investment-backed expectation but from the combination of the Owner's common law right of exclusion and the desire of tenants generally to avail themselves of CATV service, which infused value into what had previously been, as Commissioner Jones characterized it, 'negligible unoccupied space.' "

Application of the three factors enunciated by this Court in *PruneYard Shopping Center v. Robins, supra,* to the facts in this case, demonstrates that there has been "no taking" of appellant's property in the "constitutional sense" (*Armstrong v. United States, supra*).

***If it be assumed that all of the nine tenants obtained cable TV service from the appellee, the annual "expectation" would be $27.00 or $43.20 per year.

CONCLUSION.

The decision and order of the New York State Court of Appeals dated and entered May 7, 1981 should be affirmed.

Dated: Albany, New York
January 7, 1982

Respectfully submitted,

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Appendix

APPENDIX.

Executive Law, § 828.

§ 828. Landlord-tenant relationship

1. No landlord shall

a. interfere with the installation of cable television facilities upon his property or premises, except that a landlord may require:

i. that the installation of cable television facilities conform to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises, and the convenience and well-being of other tenants;

ii. that the cable television company or the tenant or a combination thereof bear the entire cost of the installation, operation or removal of such facilities; and

iii. that the cable television company agree to indemnify the landlord for any damage caused by the installation, operation or removal of such facilities.

b. demand or accept payment from any tenant, in any form, in exchange for permitting cable television service on or within his property or premises, or from any cable television company in exchange therefor in excess of any amount which the commission shall, by regulation, determine to be reasonable; or

c. discriminate in rental charges, or otherwise, between tenants who receive cable television service and those who do not.

2. Rental agreements and leases executed prior to the effective date of this article may be enforced notwithstanding this section.

3. No cable television company may enter into any agreement with the owners, lessees or persons controlling or managing buildings served by a cable television, or do or permit any act, that would have the effect, directly or indirectly of diminishing or interfering with existing rights of any tenant or other occupant of such building to use or avail himself of master or individual antenna equipment.

Page 73 of Simon Deposition of February 24, 1977.

dashed line that crosses the street from the building between 7 and 11. Can you describe what that indicates? A. That is a piece of subtrunk feeding the block at 10 West 107th Street.

Q. Would that indicate then that among the possibilities at least would be to feed a particular building from across the street as well as from other buildings in the same block? A. This wouldn't be feasible from an economic standpoint.

Q. It is done on occasions such as to feed 10 West 107th Street? A. That can be used to feed an entire block. I would have to look at the other print to know what its termination point is.

Q. If you assume that a feed from across the street could be used to service not only number 11 West 107th Street but a number of other buildings on the same block, would the thing become equally feasible to do it, is there a point it would become equally feasible?

Mr. Lesch: Object to the form of the question. You do not have enough information there to have an answer.

Q. Did you determine the economic feasibility

Page 24 of Loretto Deposition of September 14, 1977.

Unlimited from November, 1969, until the end of 1973? A. Let me clarify. Then I didn't work for Brownstones that long, because it was just about the same time. I went to work for her—yes, I did work for Barbara Martin at the time I owned that building, but I was dealing in co-ops more than brownstones.

Q. What was the purchase price of the building? A. $135,000.

Q. I believe you said that you did obtain mortgage financing? A. At that time, no, I assumed hers. She just passed it to me.

Q. What was the unpaid balance of the mortgage that you assumed? A. I could give you a guess.

Mr. Gruen: I object to the question. I don't think it is relevant.

Mr. Lesch: The value of the property is not relevant?

Mr. Gruen: The value of the property you have an answer to.

Mr. Lesch: I have the purchase price. The amount which the bank is willing to give is relevant in determining the value of the

Page 31 of Loretto Deposition of September 14, 1977.

for the property since you became the owner or Hargate became the owner.

Mr. Gruen: I will advise you of that.

Q. What was the offer next prior to the one that you received from the doctor from St. Luke's Hospital? A. Numerous, and I can't even remember. Plenty, every couple of months.

Q. How many apartments are there in the building? A. Nine.

Q. How many floors? A. Five.

Q. Are there two apartments on each floor? A. Except for the second floor, which is a floor through.

Q. How many of the present tenants were in the building when you acquired the property from Mrs. Wald? A. One.

Q. What is that tenant's name? A. Mrs. Daisy David.

Q. Has the apartment building been fully occupied throughout the whole period? A. That is true.

Amicus Brief

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No. 81-244

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JEAN LORETTO, on behalf of herself and all others similarly situated,

Appellant,

—v.—

TELEPROMPTER MANHATTAN CATV CORP., TELEPROMPTER CORPORATION and CITY OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

BRIEF FOR THE NEW YORK STATE CABLE TELEVISION ASSOCIATION AS *AMICUS CURIAE*

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APPEAL DOCKETED AUGUST 4, 1981
PROBABLE JURISDICTION NOTED OCTOBER 19, 1981

QUESTION PRESENTED

Whether the State of New York, having found that paramount public interest and free speech considerations require the development of franchised cable television systems throughout the State, may constitutionally prevent landlords from denying tenants fair and reasonable access to this new technology, where the means adopted by the State cause no economic injury to the landlord's property interests.

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IN THE

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OCTOBER TERM, 1981

No. 81-244

JEAN LORETTO, on behalf of herself and all others similarly situated,

Appellant,

—v.—

TELEPROMPTER MANHATTAN CATV CORP., TELEPROMPTER CORPORATION and CITY OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

BRIEF FOR THE NEW YORK STATE CABLE TELEVISION ASSOCIATION AS *AMICUS CURIAE*

The New York State legislature enacted Section 828 of the Executive Law to assure tenants of the right to receive franchised cable television services. Such right, and thus the statewide development of cable, had been impeded by landlords who refused to allow cable installations desired by tenants or demanded excessive fees in exchange for permission to receive cable. In challenging the constitutionality of Section 828, appellant cannot contend that the installation of a thin cable wire on a negligible, unoccupied space on the inside of her roof parapets caused economic injury. Indeed, she concedes that the availability of cable service *enhances* the value of her building.

In light of cable's substantial public interest benefits and the absence of injury to appellant, the New York State Cable

Television Association, *amicus curiae* by consent of the parties, respectfully urges this Court to affirm the holding of the New York State Court of Appeals that Section 828 of the Executive Law (i) is a constitutional exercise of the State's police power and (ii) does not take appellant's property without just compensation.

INTEREST OF *AMICUS CURIAE*

The New York State Cable Television Association is an unincorporated trade association consisting of 175 cable television companies that have franchise agreements with municipalities throughout New York State. The principal purpose of the Association, whose members currently serve more than 1,500,000 New Yorkers, is to study and respond to issues of mutual concern to the members of the cable industry.

Section 828 of the Executive Law, challenged before this Court, is an integral part of New York's comprehensive statutory scheme designed to foster the development of cable throughout the State. If this provision—which is similar to regulations in other states and municipalities—is struck down, landlords will deny tenants franchised cable services they desire (forcing them to accept limited landlord-controlled, non-franchised services), or will demand a substantial "holdup" fee to permit installation of franchised cable services preferred by tenants. Invalidation of the statute would have a disastrous impact on the development of cable. And such a ruling would come at the very time when cable is first becoming available in many densely-populated metropolitan centers of the nation, where it is of unique value to apartment-dwellers, who will be relying more and more on cable as a source of education, information, entertainment and other services in the safety and comfort of their own homes.

THE FACTUAL BACKGROUND

A. The Installation of Cable For Tenants in Appellant's Building

In 1969 Teleprompter attached approximately 30 feet of coaxial cable, less than 1/2 inch in diameter, to the roof of appellant's building,[1] plus two four-cubic-inch directional taps. These thin cables rest on the inside of the parapet, about 18 inches from the roof top (JtA160-61).[2]

Appellant, a real estate broker experienced in purchasing residential property, did not even notice the cables when she inspected the roof of the building prior to purchasing it in 1971 (App-1).[3] Appellant testified that she has never sought to have the cables removed from the building, and may never do so, because "I have good tenants. I don't want to upset them" (JtA108, 110).

Appellant also testified that many landlords believe that the availability of cable *increases* the value of their buildings (JtA100-05). Appellant admitted that the space on the roof now occupied by the cable and taps would remain unoccupied if the cable were removed; no alternative commercial or other use of that space is feasible (JtA97).

B. Cable in America: From Rural Pennsylvania to the Space Age

CATV began in the late 1940s in rural Pennsylvania, when customers at Robert J. Tarlton's appliance store complained of poor television reception because of the surrounding mountains. Tarlton set up an antenna on a mountain top to receive

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1 The record here concerns only appellant's building. This is *not* a class action for the reasons set forth in appellee Teleprompter's brief.

2 References to JtA____ are to the Joint Appendix submitted to this Court by the parties.

3 References to App-____ are to the Appendix annexed to this brief, consisting of excerpts of the record before the New York Court of Appeals not included in the Joint Appendix.

the broadcast signals and ran a coaxial cable to the homes in the valley below.[4] Cable has evolved from that simple community antenna system to today's sophisticated, multi-channel medium.

Unlike conventional television, which broadcasts electromagnetic waves over the scarce public air waves, cable transmits electrical signals through coaxial cables. The cable is physically linked to the source of the signals, called the "head end." Feeder lines run from the central cable to buildings in the area, and "drop" lines are connected to television sets of cable subscribers. Thus, a subscriber's television set must be physically linked to the programming source by means of cables.[5]

Coaxial cables are capable of simultaneous transmissions on a large number of separate channels. Modern cable systems offer as many as seventy channels, and the systems now proposed for New York City and elsewhere offer 100 or more channels.[6] As the technology becomes more sophisticated, a single cable could offer several hundred channels to every home.

Unlike the television stations and the three commercial networks, cable does not suffer from scarcity of spectrum space, and is not dependent on advertisers' demands for bland, mass appeal programming. Instead, cable has an abundance of

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4 *See* R. Smith, *The Wired Nation* 3 (1972) (hereafter, "The Wired Nation"); Cabinet Committee on Cable Communications, *Cable: Report to the President*, 10 (1974) (hereafter, "Report to the President").

5 *See, e.g.*, Sloan Commission, *On the Cable: The Television of Abundance*, 11-16 (1971) (hereafter, "Sloan Commission Report"); *The Wired Nation, supra*, at 4.

6 *See generally, Telecommunications in Transition: The Status of Competition in the Telecommunications Industry*, Report by the Majority Staff, Subcommittee on Telecommunications, Consumer Protection, and Finance of the Committee on Energy and Commerce, United States House of Representatives, Nov. 3, 1981 at 296 (hereafter, "Telecommunications in Transition"); *Broadcasting/Cable Yearbook* (1981) at G-1; *Weekly Television with Consumer Electronics* (v.21, n.48, Nov. 30, 1981) at 2.

channels and derives its support primarily from the viewers themselves.[7] As this Court has observed, "[t]he potential of the [cable] industry to augment communication services now available is . . . phenomenal." *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 651 (1972). Similarly, Justice Douglas, concurring in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 158, n.8, observed:

> Scarcity may soon be a constraint of the past, thus obviating the concerns expressed in *Red Lion*. It has been predicted that it may be possible within 10 years to provide television viewers 400 channels through the advances of cable television.

Cable, with a multiplicity of channels, can provide a great variety of programming and services to discrete audiences, who select the programs that serve their particular interests and needs. Thus, for example, cable offers recent feature films (uncut and uninterrupted by commercials) for both general audiences and the aficionado, cultural channels featuring drama, opera and ballet, all-news and all-sports channels, minority interest, foreign language and ethnic programming, gavel-to-gavel coverage of the House of Representatives, health and science channels, children's channels, and various religious channels.[8] New services, locally originated or provided by satellites, are constantly appearing.

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7 *See, e.g., Cable Television: Promise Versus Regulatory Performance*, Staff Report to the Subcommittee on Communications, Committee on Interstate and Foreign Commerce, United States House of Representatives, Jan. 1976 (hereafter, "Promise Versus Regulatory Performance") at 3; *Final Report of the President's Task Force on Communications Policy*, ch. VII at 4-5 (1968).

8 *See, e.g., The Wired Nation*, *supra*, at 31; *Promise Versus Regulatory Performance*, *supra*, at 62; Mann, *What TV Revolution Will Bring Into Your Home*, U.S. News and World Report, Sept. 14, 1981 at 67-68; Cooney, *Cable Television is Attracting More Ads; Sharply Focused Programs are One Lure*, The Wall Street Journal, Mar. 31, 1981 at 56; *Why Advertisers Are Rushing to Cable TV*, Business Week, Nov. 2, 1981 at 96; *New Cable to Cover Health and Science*, The New York Times, Nov. 17, 1981, section C, at 19.

One of cable's most significant benefits is for local community services: broadcasting of town meetings, school board hearings, and messages from representatives and candidates. Such political programming is often prohibitively expensive on the scarce outlets of commercial television; but with cable's abundance of channels, there is ample capacity to address local constituencies at relatively low cost.[9]

Cable also transmits textual information such as wire services, stock market quotations, weather data—even an entire "electronic newspaper" is possible.[10] Modern cable will offer "interactive" or two-way communication between the viewer's home and computers at the programming source, ranging from medical and police alerts to burglar and fire alarms,[11] sophisticated banking services, opinion polling, and shopping for merchandise at home.[12]

Cable has experienced explosive growth in the last decade. In 1965, only 1,275,000 homes—2.5 percent of the television households in the United States—subscribed to cable television. Today, however, about 25% of homes with televisions—

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9 *See, e.g., Sloan Commission Report, supra,* at 115-122.

10 *See, e.g., Telecommunications in Transition, supra,* at 296; Machalaba, *Hot off the Screen: More Publishers Beam Electronic Newspapers to Home Video Sets,* The Wall Street Journal, Jan. 2, 1981 at 1; Sanoff, *Electronic Newspapers: Will They Be Here Soon?* U.S. News and World Report, May 11, 1981 at 61-62.

11 *See, e.g.,* Andrew, *Home Security is a Cable TV, Industry Bets,* The Wall Street Journal, Sept. 15, 1981, at 31.

12 *See, e.g.,* Cooney, *New Channels for Sales,* The Wall Street Journal, July 14, 1981 at 52; *Broadcasting/Cable Yearbook* (1981) at G-1. Cable is now widely used in New York State. In Nassau County and in Amherst, New York, for example, an interactive cable system is being used to deliver computer-assisted instruction to the homes of severely handicapped children. *See generally Cable Communications in New York State: An Agenda For Government Involvement,* Report of the New York State Commission on Cable Television (Docket No. 90112), Sept. 1981 at 111-12 (hereafter, "Cable Communications in New York State").

approximately 20,000,000 families—subscribe to cable, and the penetration rate is expected to double by 1990.[13]

Initially, cable was available in rural areas consisting of single family homes, and most extant cable systems still serve small communities. Cable is just starting to penetrate major metropolitan centers.[14]

> [I]t is apparent from the data available that only 9 of the top 50 markets have cable penetration exceeding 30 percent, and only 16 of the top 50 markets have passby figures which exceed 30 percent. In many major markets cable availability is much smaller than that. In Chicago, Detroit, Washington, D.C. and Dallas-Fort Worth, the nation's third, seventh, eighth, and tenth largest markets respectively, cable is available to only 6, 4, 8, and 1, percent of the homes.[15]

In New York City, only Manhattan and a small section of the Bronx are presently wired for cable; franchises for the other boroughs are being selected now.[16] Other cities currently being wired for cable include Pittsburgh, Houston, Dallas, Boston and Los Angeles. Chicago, Denver, Milwaukee, Minneapolis and Philadelphia are now in the process of awarding franchises. Since apartment buildings dominate these urban centers, the ability of states and municipalities to adjust the rights of landlords and tenants with respect to the availability of cable is a matter of pressing national importance.[17]

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13 *See* Schwartz, *The Major TV Networks' Dwindling Audiences*, The New York Times, Jan. 14, 1982, Section C, at 20; *Telecommunications in Transition*, *supra*, at 290-91, 348-49. It is estimated that 4,400 cable systems are now in operation in 10,400 communities. *See Broadcasting/Cable Yearbook* (1981) at G-1.

14 *See Telecommunications in Transition*, *supra*, at 349; *Broadcasting/Cable Yearbook* (1981) at G-1.

15 *See Telecommunications in Transition*, *supra*, at 350.

16 *See* Landro, *Down to the Wire*, The Wall Street Journal, Nov. 18, 1981, at 1.

17 Connecticut and Massachusetts have enacted statutes comparable to Section 828. *See* Conn. Gen. Stat. Ann., § 16-333(a) (West 1979);

C. The State of New York's Interest in Fostering Cable's Development

In 1972, the New York State Legislature enacted a comprehensive statute regulating cable television systems franchised by municipalities in the State. The legislation created a Commission on Cable Television, charged with supervising and fostering the growth of franchised cable television in the public interest.

The cable statute declares at the outset:

> Upon investigation of the public interest associated with cable television, the legislature of the State of New York has determined that while cable television serves in part as an extension of interstate broadcasting, operations involve public rights-of-way, municipal franchising, and vital business and community service, and, therefore, are of state concern; that while said operations must be subject to state oversight, they also must be protected from undue restraint and regulation so as to assure cable systems with optimum technology and maximum penetration in this state as rapidly as economically and technically feasible; that municipalities and the state would benefit from valuable educational and public services through cable television systems; that the public and the business community would benefit if served by cable channels sufficient to meet the needs of producers and distributors of program and other communication content services . . . .[18]

The Legislature's findings, and the basic statutory framework, were based on two comprehensive analyses, the "Kelly

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Mass. Gen. Laws Ann., ch. 166A, § 22 (West 1976). Dallas, Texas, also has a similar ordinance. *See* Dallas, Tx., Ordinance No. 16739, §§ 12-14 (Nov. 5, 1980).

18 N.Y. Exec. Law, art. 28 § 811 (McKinney 1981).

Report"[19] and the "Jones Report."[20] The Kelly Report stressed that franchised cable systems, with an abundance of channels, would foster important First Amendment values for citizens of New York.[21]

In addition, as the State Cable Commission recognized:

> The economic health of New York State will become increasingly dependent upon our ability to ensure the availability of adequate information and communication resources to keep and attract new business to the State.[22]

The Legislature, however, found that landlords' conduct constituted a major impediment to cable's full development in the State. The Jones Report found that landlords in the cities frequently interfered with their tenants' access to cable services.[23] Chairman Swidler of the New York Public Service Commission testified during the hearings on the proposed legislation:

> *[L]andlords in many instances have imposed extremely onerous fees and conditions on cable access to their*

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19 *Cable Television: A Public Service—A State Concern*, Final Report of the New York State Assembly Standing Committee on Corporations, Authorities and Commissions, Apr. 15, 1972 (hereafter, the "Kelly Report").

20 *Regulation of Cable Television By the State of New York*, Report to the State of New York, Public Service Commission, Dec. 1970 (hereafter, the "Jones Report").

21 *Kelly Report*, *supra*, at 59. *See also Cable Communications in New York State*, *supra*, at 143.

22 *Cable Communications in New York State*, *supra*, at 115. Joseph C. Swidler, Chairman of the State Public Service Commission, wrote to Governor Rockefeller in 1970 about cable's "large potential for growth" and the "business opportunities . . . envisaged for the new industry." *See* Letter from Joseph C. Swidler to Nelson Rockefeller, Dec. 31, 1970, at 1, annexed to Jones Report (hereafter, "Swidler letter").

23 *See Jones Report*, *supra*, at 166, 181, 206-207.

> *buildings*. Clearly, landlords should be allowed to impose conditions governing the safety and appearance of their property and to require the CATV company or the tenant to bear the full cost of installation and indemnification for damage. *Legislation is necessary, however, to prohibit gouging and arbitrary action.*[24]

Similarly, the State Commission has observed:

> Many landlords routinely charged cable television companies exorbitant fees for the 'privilege' of wiring their buildings and serving their tenants.[25]

The landlords' abuse of their leverage—control of entry to buildings—was found to be "disadvantageous not only to the personal interests of tenants, but to the development of the CATV industry" in general.[26] The exorbitant fees charged by landlords inhibited the extension of cable services in municipalities throughout the state.[27] Indeed, some landlords arbitrarily refused to allow their tenants to receive cable television at all (App-2). Accordingly, Chairman Swidler and the Jones Report recommended legislation prohibiting landlords from interfering with the installation of cable equipment or charging a fee in excess of that approved by the State Cable Commission.[28]

The need for Section 828 has been underscored by recent developments—namely, the burgeoning number of landlords who are attempting to restrict tenants to receiving *only* the landlords' wholly-owned or licensed limited type of cable

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24 Quoted in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 53 N.Y.2d 124, 141, 440 N.Y.S.2d 843, 852, 423 N.E.2d 320, 328 (1981) (emphasis supplied).

25 *See Cable Communications in New York State*, *supra*, at 66.

26 *Jones Report*, *supra*, at 206-207.

27 *Loretto*, 53 N.Y.2d at 144, 440 N.Y.S.2d at 852, 423 N.E.2d at 329. *Accord*, *Cable Communications in New York State*, *supra*, at 66.

28 *Jones Report*, *supra*, at 207; *Swidler letter*, *supra*, at 5.

service. This service, generally transmitted by satellite to an earth station on the landlord's premises or by master antenna systems, is not franchised by the local municipality or regulated by the State. Its programming is usually confined to pay movies, and it does not offer community-service channels, local programming, or the myriad of other services provided by franchised, multi-channel cable systems.[29]

Section 828 represents a balancing of the rights of landlords and tenants in the same property. As the Jones Report observed:

> This proposal involves some intrusion upon the property interest of the landlord. But *the interest intruded upon is a wholly abstract one*—given the conditions specified, *the landlord's interest consists entirely of insisting that some negligible unoccupied space remain unoccupied. The tenant's interest clearly is more substantial, consisting of a right to receive (and perhaps send) communications from and to the outside world.* In the electronic age, the landlord should not be able to preclude a tenant from obtaining CATV service (or to exact a surcharge for allowing the service) any more than he could preclude a tenant from receiving mail or telegrams directed to him.[30]

The Legislature was sensitive, however, to the legitimate interests of landlords. Thus, Section 828 provides that (i) the cable operator or tenant must bear the entire cost of installation, operation, and removal of cable facilities; (ii) the installation must conform to reasonable requirements imposed by the landlord to protect the safety, operation, and appearance of his bulding and the convenience of other tenants; and (iii) the cable company or tenant must indemnify the landlord for any damage arising out of the cable installation, operation, or

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29 *See generally*, Brief of *Amici Curiae* National Satellite Cable Ass'n, *et al.* at 36-39, suggesting that landlords who install such satellite systems should have the right to exclude competition from franchised cable systems.

30 *Jones Report*, *supra*, at 207 (emphasis supplied).

removal.[31] The statute also provides that the landlord may receive from the cable company a payment "not in excess of any amount which the Commission, by regulation, determines to be reasonable."[32] The Commission, as discussed below (*see* pp. 27-29), has conducted administrative proceedings since 1973 to determine fair compensation under Section 828 pursuant to eminent domain criteria.[33]

SUMMARY OF ARGUMENT

Section 828 is a valid exercise of New York's police power. The New York Legislature determined that the right to receive cable—with all of its varied services—is important for tenants in this modern industralized and urbanized world. The Legislature thus enacted Section 828 to prevent landlords from depriving tenants of this right or imposing onerous terms. Section 828 is an eminently rational means of regulating landlord-tenant relations and promoting communications and educational interests. It is well within the State's police power.

Section 828, moreover, does not take property of the appellant without just compensation. The statute clearly satisfies the pragmatic balancing test that this Court has used in its *ad hoc* analysis of cases under the "taking" clause. First, no "property" of the landlord has been taken since the negligible portion of the roof utilized for cable wires is an appurtenance to each tenant's leasehold. Second, the availability of cable has enhanced rather than diminished the value of appellant's building, so there is no detrimental impact on landlords.

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31 N.Y. Exec. Law § 828(1)(a)(i-iii) (McKinney 1978).

32 N.Y. Exec. Law § 828(1)(b)(McKinney 1978).

33 *See* State of New York Commission on Cable Television, *In the Matter of Implementation of Section 828 of the Executive Law*, Docket No. 90004, *Statement of General Policy*, Jan. 15, 1976 (hereafter "Statement of General Policy") (JtA44-55). *See also* State of New York Commission on Cable Television, *In the Matter of Implementation of Section 828 of the Executive Law*, Docket No. 90004, *Clarification of General Policy*, Aug. 27, 1976 (hereafter, "Clarification of General Policy") (JtA56-69).

Third, Section 828 does not interfere with a landlord's investment-backed expectations. Fourth, Section 828 reasonably arbitrates between the interests of landlords and tenants without unfairly singling out private persons to bear public burdens. Any of the foregoing factors, standing alone, would preclude a finding of a taking. In combination, they make this an *a fortiori* case.

Finally, assuming *arguendo* that Section 828 constituted a taking, the statutory scheme provides for adequate and just compensation to be determined by the State Cable Commission. Under Section 828, a landlord may obtain compensation of a reasonable fee in exchange for allowing cable on his property. The procedure for determining the reasonable fee fully comports with constitutional requirements.

Argument

I

SECTION 828 IS A VALID EXERCISE OF THE POLICE POWER

The New York State Legislature, after extensive studies, decided to encourage the rapid development of franchised cable television because this new technology promotes important communications interests of its citizens and other vital public interests. But the Legislature found that cable's public-interest potential was being frustrated by landlords who either denied tenants the right to receive such services or demanded exorbitant fees. Section 828, carefully tailored to deal with the problem of landlord interference, is surely a reasonable legislative response well within the State's broad police power. This Court should decline appellant's invitation to second-guess the judgment of the legislature in this area. *See, e.g., Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 487 (1955); *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 424-25 (1952).

The mere fact that the legislation has some minimal impact on claimed property rights clearly does not hamstring New York's power to legislate in this important field.

> Neither property rights nor contract rights are absolute. . . . Equally fundamental with the private right is that of the public to regulate it in the common interest. . . .
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> [T]he guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be attained.

Nebbia v. *New York*, 291 U.S. 502, 523, 525 (1934). *Accord, e.g., Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 124-25 (1978). Section 828 passes that test with flying colors.

1. Section 828 is a Permissible Regulation of the Landlord-Tenant Relationship.

Rights of property owners are not absolute or static, but must be accommodated to changing times and social circumstances. *See* 5 R. Powell, *The Law of Real Property* ¶ 745 at 493-94 (1981). Thus New York, like other states, regulates landlord-tenant relations in light of the evolving needs of an industrial and urbanized society. *Id.* Some of the regulations place negative restraints on the landlord and, unlike the statute here, cause substantial economic dislocations. Rent control regulations are a classic example.[34] Many regulations impose affirmative duties on landlords to install physical objects in their buildings. For example, New York State requires all landlords to install intercommunication or "buzzer" systems, with a central unit in the common area of the entryway and wiring running to each apartment; and New York City requires the installation of smoke detectors in all apartments.[35] In spite

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34 *See* N.Y. City Admin. Code, §§ Y51-5.0, Y51-10.0(d); *Block* v. *Hirsh*, 256 U.S. 135 (1921) (Holmes, J.); *People ex rel. Durham Realty Corp.* v. *La Fetra*, 230 N.Y. 429, 130 N.E. 601, *appeal dismissed sub nom. People ex rel. Brixton Operating Corp.* v. *La Fetra*, 357 U.S. 665 (1921).

35 *See* N.Y. Mult. Dwell. Law § 50-a (McKinney 1974) (requiring installation of intercommunication systems and self-locking doors at

of these physical invasions, no one seriously contests the States' constitutional authority to legislate under the police power in these vital areas.

Since the landlord-tenant relationship is not static but evolves in light of the problems of urban life, New York clearly may adopt regulations to alter common law rules and foster new communications technologies that offer important services to the millions of city dwellers who happen to rent rather than own their homes. As this Court stated in *Munn* v. *Illinois*, 94 U.S. 113, 134 (1877),

> [a] person has no property, no vested interest in any rule of the common law. . . . Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct may be changed at the will . . . of the legislature unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.[36]

Similarly, Justice Marshall observed in his concurring opinion in *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 92-93 (1980), that to prohibit the states from revising the laws of trespass "would freeze the common law . . . at its 19th Century state of development. It would allow no room for change in response to circumstances."

One of the most conspicuous examples of the revision of common law property concepts is in the field of landlord-tenant relations. *See* 5 R. Powell, *supra*, at §§ 754-46. A tenant's interest might be confined to the four walls of his apartment if a court were to be bound by feudal notions of property in an

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building entrance); N.Y. City Admin. Code § C26-1705.2 (requiring installation of smoke detecting devices in all apartments). *See also* N.Y. Mult. Dwell. Law § 51-a (McKinney 1971) (requiring installation of peepholes); N.Y. Mult. Dwell. Law § 51-b (McKinney 1974) (requiring installation of mirrors in elevators).

36 *Accord, e.g., Silver* v. *Silver*, 280 U.S. 117, 122 (1929); *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972).

agrarian setting. But a 20th-Century tenant's rights in an industrial and urban society now extend to those common areas of the building that are reasonably essential to his enjoyment of his leasehold. The landlord no longer has a right to do whatever he chooses with the common areas of a building, since the tenants have an interest in those areas as appurtenances to their leaseholds. The New York Legislature, exercising its police power, has constitutionally determined that landlords shall not interfere with the tenants' right to receive franchised multi-channel cable communications services.

2. Section 828 Promotes the First Amendment and Other Public Interests of New York's Citizens.

In addition to its normal broad discretion in regulating landlord-tenant relations, New York had an additional and overriding state interest in enacting Section 828—namely, safeguarding the tenant's free-speech interests, recognized by the First Amendment of the United States Constitution and Article I, Section 8 of the New York State Constitution.

As demonstrated above (pp. 4-6), multi-channel franchised cable systems, with interactive two-way capacity, foster free speech interests of New Yorkers. Cable, as noted above, promotes substantial political, civic, educational, and cultural values and also contributes to the State's overall welfare. It is unquestionably within the State's police power to prevent landlords from denying tenants the opportunity to receive such services or from exacting excessive fees.

In *Pruneyard*, for example, this Court held that the States may constitutionally adopt reasonable restrictions on private property to foreclose an action for trespass and permit the exercise of First Amendment rights. 447 U.S. at 80-85. Similarly, in *Marsh* v. *Alabama*, 326 U.S. 501, 508-09 (1946), this Court held that the right of residents of a company town to receive information outweighed the right of property owners to exclude *strangers*.[37] As this Court has made clear, the public

37 Similarly, owners of migrant worker camps may not assert property rights to exclude strangers from entering onto their land to communi-

has a "paramount" right to the widest diversity of information and entertainment.[38]

The New York statute also guarantees that tenants will have the freedom to select the cable communication programs and services *they* desire. In contrast, some apartment house entrepreneurs seek to deprive tenants of this freedom by installing their own satellite earth stations or master antenna systems or by making exclusive profit-sharing arrangements with program distributors who provide service via new technologies.[39] These *exclusive* non-franchised landlord services—which basically feature pay movies and offer no local or public-interest programs—preempt the tenants' freedom to choose multi-channel, franchised cable, which is not exclusive and which offers many more services and a far greater diversity of programs. In addition, by "skimming the cream" of the market (high-density luxury apartments), the limited cable services offered by landlords undermine the economic viability of franchised cable systems, which must provide public-interest programs and furnish services to *all* homes in a community under their franchise agreements.[40]

The foregoing considerations provide still further support for New York's exercise of the police power here. It is well established that a State may prevent a landlord from dictating to a tenant what services or goods he may select.[41] Those

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cate messages. *See Franceschina* v. *Morgan*, 346 F. Supp. 833 (S.D. Ind. 1972); *Folgueras* v. *Hassle*, 331 F. Supp. 615 (W.D. Mich. 1971); *State* v. *Shack*, 58 N.J. 297, 277 A.2d 369 (1971). By analogy, many apartment dwellers in big cities are shut-ins or prefer to watch cable programs at night in the safety and comfort of their own apartments.

38 *Associated Press* v. *United States*, 326 U.S 1, 20 (1945). *Accord*, *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969).

39 *See* Appellant's Brief at 98-99; *see generally* Brief of *Amici Curiae* National Satellite Cable Ass'n, *et al.*

40 *See Jones Report*, *supra*, at 185.

41 *See*, *e.g.*, N.Y. Gen. Bus. Law § 340 (McKinney 1968) (construed to preclude landlord from barring tenant's spring water supplier in favor of supplier to whom landlord wanted to give exclusive franchise in

precedents have especially great impact in a case involving a tenant's free speech interests. As the Jones Report observed (p. 185): "[Television viewers] act as free men, and as consumers, just as much when they watch television as when they decide where to live, what to purchase, and how they will spend their leisure time generally."

In short, New York State acted well within its police power in enacting Section 828. Its legislative goals are clearly in the public interest, and there is a reasonable nexus between those goals and the means selected to achieve them.[42]

3. Section 828 Furthers a National Policy of Promoting the Development of Cable.

New York's exercise of its police power here also furthers the federal policy of enhancing the growth of cable as a broadband communications service across the nation. The Federal Communications Commission and the courts have taken action designed to encourage the nationwide development of cable as

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Eagle Spring Water Co. v. *Webb & Knapp, Inc.*, 236 N.Y.S.2d 266 (Sup. Ct. N.Y. Co. 1962)); N.Y. Real Prop. Law § 233 (McKinney 1979) (prohibiting landlords of mobile home park from barring utility suppliers or installers selected by tenants); N.Y. Real Prop. Law § 238 (McKinney 1979) (prohibiting agreements between landlords and suppliers of fuel, ice or food for exclusive rights to serve tenants).

42 While appellant vaguely suggests that there might be alternative means of achieving the state's legislative goals, that general argument should be addressed to the policy-makers in the legislature, not to this Court. Under the police power, it is constitutionally irrelevant that alternative methods of achieving the legislative goal may be available. *See, e.g., Pruneyard*, 447 U.S. at 85 n.8.

Amici curiae National Satellite Cable Ass'n, *et al.* suggest that Section 828 is an invalid exercise of the police power because the State has favored franchised cable systems over the so-called "private" or nonfranchised cable companies. That is not true, since all cable systems have access to tenants under the New York law. In any event, since the legislature has found that the statute serves substantial public interest objectives, it would be constitutionally irrelevant if the enactment benefited certain private interests. *See, e.g., Berman* v. *Parker*, 348 U.S. 26, 32 (1954); *Block* v. *Hirsh*, 256 U.S. at 155; *Noble State Bank* v. *Haskell*, 219 U.S. 104, 110 (1911).

rapidly as possible, free of artificial restraints.[43] The Executive Branch has also stressed the vital public interest in encouraging the widespread development of a nationwide, broad-band cable communications system.[44]

Section 828 and similar statutes and local ordinances are consistent with these national priorities. Millions of Americans live in multiple dwellings in metropolitan areas across the nation. Those citizens should have the same rights as homeowners to receive the benefits of cable television. But the development of cable in urban centers, requiring particularly high capital investments, cannot proceed if landlords are permitted to block access or demand monopoly rents.

II

SECTION 828 DOES NOT EFFECT A TAKING OF PROPERTY UNDER THE FIFTH AND FOURTEENTH AMENDMENTS

This Court has repeatedly held that there is no *per se* rule or "set formula" for determining when economic loss caused by government action constitutes a "taking" within the meaning of the Fifth and Fourteenth Amendments. Rather, the Court examines the taking question "by engaging in essentially ad hoc, factual inquiries." *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979). *Accord*, *Pruneyard*, 447 U.S. at 83; *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 124 (1978); *Goldblatt* v. *Hempstead*, 369 U.S. 590, 594 (1962).

Far from laying down mechanical rules based on feudal "property notions," as appellant suggests, this Court has consistently adopted a balancing test, looking to pragmatic factors in ascertaining whether the compensation clause has been

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43 *Cable Television Report and Order*, 36 F.C.C. 2d 143 (1972); *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) (removing restrictions on programs eligible for pay cable); *Malrite T.V. of New York* v. *FCC*, 652 F.2d 1140 (2d Cir. 1981) (upholding FCC abolition of rules limiting distant signal importations).

44 *Report to the President*, *supra*, at 15.

triggered. These variables include the character of the governmental action, the economic impact of the action on the property holder, and the extent to which the owner's "investment-backed" expectations have been frustrated. *See e.g.*, *Pruneyard*, 447 U.S. at 82-83; *Kaiser Aetna*, 444 U.S. at 175; *Penn Central*, 438 U.S. at 124-25. Ultimately, because "no precise rule determines when property has been taken, . . . the question necessarily requires a *weighing* of private and public interests." *Agins* v. *City of Tiburon*, 447 U.S. 255, 260-61 (1980) (emphasis supplied). Under such criteria, the constitutionality of Section 828 must be sustained.

1. No "Property" of the Landlord Has Been Taken by Section 828.

The Fifth Amendment provides "nor shall property be taken for public use, without just compensation." But no "property" of appellant was taken. Appellant has not established that the negligible unoccupied space inside the parapet of the roof utilized to provide cable is exclusively her property, rather than an appurtenance of her tenants' leaseholds. Indeed, as noted above (pp. 14-16), the whole point of Section 828 is that there has been a legislative determination that cable service is important to the tenant's enjoyment of his leasehold, just like intercom systems, smoke detectors and lobby attendants. Since the tenant's interest may be extended by the State beyond the four bare walls of his apartment in the light of changing urban conditions and new technologies, Section 828 does not take *appellant's* property at all.[45] But, even assuming *arguendo* that

45 *See e.g.*, *Henry A. Fabrycky, Inc.* v. *NAD Realty Corp.*, 261 A.D. 268, 269, 25 N.Y.S.2d 347, 349 (2d Dep't 1941) ("appurtenances reasonably essential to the enjoyment of the demised premises pass as an incident to them unless specially reserved"); *Javins v. First National Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir. 1970) (urban tenant today seeks a "package of goods and services—a package which includes not merely walls and ceilings"); *400 North Rush, Inc. v. D. J. Bielzoff Products Co.*, 347 Ill. App. 123, 106 N.E.2d 208 (App. Ct. 1952) (exterior walls of leased premises are part and parcel of the demise to the lease); M. Friedman, *Friedman on Leases*, § 3.2 (1st ed. 1974). *See also*, N.Y. Mult. Dwell. Law § 50-c (McKinney 1974) (prohibiting landlords from interfering with tenant programs for lobby attendant services in common areas of building).

appellant had an exclusive property interest in the roof space used for cable, there still would be no taking.

2. Section 828 Has No Detrimental Impact on Landlords, But Enhances The Value of Their Property.

A taking is not established by merely showing that an owner has "been denied the ability to exploit a property interest that [he] heretofore had believed was available for development. . . ." *Penn Central,* 438 U.S. at 130. And this is true even where the value of the property has been effectively destroyed, *Miller* v. *Schoene*, 276 U.S. 272 (1928), or where the most beneficial use of the property has been substantially curtailed. *See Goldblatt*, 369 U.S. at 592-93; *Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979).

Appellant does not contend that the cables inside her roof parapets impinge on her ability to lease apartments at fair rents. Nor does Section 828 interfere with appellant's ability to sell her building at a fair price. Indeed, appellant concedes that many landlords believe that the availability of cable *enhances* the value of their buildings (JtA100-05).[46] She also testified that the cable installation has not prevented any alternative commercial or other exploitation of the space it occupies inside the parapet on the roof (JtA97). Accordingly, this is *not* a case in which the property owner has suffered any economic detriment.

Moreover, as this Court held in *Penn Central*:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole. . . .

438 U.S. at 130-131. Appellant retains a full "bundle" of property rights in her building; that she is prohibited from

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46 In fact appellant testified that she does not want the cable removed from her property, because "I have good tenants. I don't want to upset them" (JtA108, 110).

exercising a single claimed right as to one discrete—and rather slender—stick in that bundle does not mean that her property has been "taken." *See Andrus*, 444 U.S. at 66.

We are aware of no decision in which any court has condemned as a taking a government regulation that, like the action of New York here, has *increased* the value of the owner's property. To the contrary, this Court has often *upheld* regulations even though they caused substantial economic harm to the owner.[47] As Justice Holmes has said: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 413 (1922).

It would be inconsistent with both policy and common sense—except, perhaps, in Alice's Wonderland—to hold that "changes in the general law" that make a property owner's building more valuable constitute an illegal taking.

3. Section 828 Does Not Interfere With A Landlord's Investment-Backed Expectations.

Section 828 does not interfere with appellant's investment-backed expectations. *See Penn Central*, 438 U.S. at 124; *Kaiser Aetna*, 444 U.S. at 175. Indeed, when appellant purchased the building, she was unaware of the existence of the cable (JtA82-83). Her expectation was that she would receive reasonable rents from tenants, and that the building would have a fair resale value. Those investment-backed expectations have in no way been adversely affected by Section 828.

4. Section 828 Reasonably Arbitrates Between the Interests of Tenants and Landlords Without Unfairly Singling Out Private Persons to Bear Public Burdens.

The "character of the government action" here also militates against a finding of a taking. *See, e.g., Pruneyard*, 447 U.S. at

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47 *See, e.g., Block* v. *Hirsh*, 256 U.S. 135 (Holmes, J.) (rent control legislation); *Penn Central*, 438 U.S. at 135-38 (prohibition of utilization of air rights above Grand Central Terminal valued up at up to $300 million); *Andrus*, 444 U.S. at 66 (prohibition of sale of property); *Goldblatt*, 369 U.S. at 592 (prohibition of excavation); *Euclid* v.

83. As Section 828's legislative history reveals, the statute was designed to balance the interests of landlords and tenants in the same property and to ensure that persons who rent their homes were not disadvantaged in seeking the opportunity to receive cable service. *See Loretto*, 53 N.Y.2d at 145, 440 N.Y.S.2d at 853, 423 N.E.2d at 331. Where the State has acquired property to permit or facilitate uniquely public functions and thereby has destroyed the principal use of the property in private hands, this Court has sometimes found a taking.[48] But where, as here, the State has acted in its classic role as arbiter of competing interests (adjusting the benefits and burdens of economic life for the public good) and not transformed the character of the property, a taking has not been found. *See, e.g., Penn Central*, 438 U.S. at 124, 128, 135. *See generally* Sax, *Taking and the Police Power*, 74 Yale L.J. 36 (1964).

Furthermore, the benefits and burdens of Section 828 have been distributed across substantial numbers of persons by the State, acting in its arbitral capacity. Of course, "[l]egislation designed to promote the general welfare commonly burdens some more than others." *Penn Central*, 438 U.S. at 133. But here, every single landlord is treated identically under the statute. Thus, assuming *arguendo* that a cable installation created a *de minimis* economic burden, it would be a burden shared equally by all landlords in New York. And many of the benefits of widespread cable penetration—civic, political, educational, cultural, and recreational—will accrue to landlords as much as to anyone else. In unanimously upholding a municipal zoning ordinance against a taking challenge, this Court recently declared:

> *[A]ppellants therefore will share with other owners the benefits and burdens of the city's exercise of its police power.* In assessing the fairness of the zoning ordinance,

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Ambler Realty Co., 272 U.S. 365, 382 (prohibition of industrial development of land).

48 *See, e.g., United States* v. *Causby*, 328 U.S. 256, 262-63 (1946) (low overflights of government planes); *Portsmouth Co.* v. *United States*, 260 U.S. 327 (1922) (firing range established near private property); *Kaiser Aetna, supra*, 444 U.S. at 180 (transformation of private marina into public aquatic park).

> these benefits must be considered along with any diminution in market value that appellants might suffer.

Agins, 447 U.S. at 262 (emphasis supplied). Accordingly, in light of the character of the government action here, the constitutionality of Section 828 must be sustained.[49]

5. Appellant's Claim that Any Physical Invasion of Property Constitutes a *Per Se* Taking Is Without Merit.

There is no place in takings jurisprudence for a *per se* rule that compensation is required whenever there is a physical intrusion onto property, no matter how minimal. Physical invasions of property were challenged in *Pruneyard*, *Kaiser Aetna*, and *Causby*. Yet, in each of those cases, this Court applied a pragmatic balancing test, not a mechanical rule.

Indeed, in *Pruneyard* this Court upheld a State rule that a privately-owned shopping center must permit strangers to enter the center to pass out pamphlets and solicit signatures on petitions. The center's owner argued that the State had violated the takings clause by infringing on his right to prevent a physical invasion of his property. This Court, denying that claim, declared:

> *It is true that one of the essential sticks in the bundle of property rights is the right to exclude others. . . . And here there has literally been a 'taking' of that right* to the extent that the California Supreme Court has interpreted the State Constitution to entitle its citizens to exercise free expression and petition rights on shopping center property. *But it is well established that "not every destruction*

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49 Given the physical layout of cable systems in large cities, the use of "crossovers" (cable extensions connecting adjoining buildings to the trunk cable) is a practical necessity (App-3). Here, the alleged intrusion due to crossovers is *de minimis*; the crossovers on appellant's property accounted for only four to six additional feet of cable. *Loretto*, 53 N.Y.2d at 142 n.16, 440 N.Y.S.2d at 851 n.16, 423 N.E.2d at 328 n.16. The legislative purpose in encouraging cable development would be entirely frustrated if tenants in one building were blocked from access to cable by a recalcitrant owner of the adjoining parcel. Application of this Court's traditional balancing test establishes that there has been no taking in the case of crossovers.

or injury to property by governmental action has been held to be a 'taking' in the constitutional sense."

447 U.S. at 82-83 (*quoting Armstrong* v. *United States*, 364 U.S. 40, 48 (1960)).[50]

Pruneyard explicity held that the fact that the State limited the right to exclude strangers from property is not dispositive of the taking issue. Rather, the owner must demonstrate that the right to exclude is "so essential to the use or economic value of his property that the state-authorized limitation of it amounted to a 'taking' ". 447 U.S. at 84. Because the physical invasion of the shopping center did not unreasonably impair the value or use of the property, this Court held that the State had not "taken" any property interest.

Appellant asks this Court to repudiate *Pruneyard*. She argues that it is irrelevant that the claimed interference with the enjoyment and profitable use of her property is microscopic, or that it is substantially outweighed by the public benefits to be derived from the statute.[51] Appellant urges the Court to abandon the *ad hoc*, factually oriented balancing approach it has employed in takings cases in favor of a crude, mechanical rule that *any* physical invasion, no matter how Lilliputian, constitutes a taking.

To adopt such an arbitrary rule would constitute a retreat from modern reality into formalistic archaism. For the claim that the mere existence of an alleged physical intrusion constitutes a *per se* taking has been rejected by this Court in a long line of cases in favor of a balancing test weighing the facts peculiar to the case.[52]

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50 This is a far stronger case than *Pruneyard* since it involves, not strangers to the land, but tenants in possession with rights in appurtenances.

51 In fact, appellant requests this Court to second-guess the benefit/burden calculus that was carefully made by the State legislature. But in the context of the takings clause, "a declaration by a legislature concerning public conditions that by necessity and duty it must know, is entitled at least to great weight." *Block* v. *Hirsh*, 256 U.S. at 154 (Holmes, J.).

52 *See, e.g., Kaiser Aetna*, 444 U.S. at 175-176 (owner of private pond "invested substantial amounts of money in making improvements");

Appellant insists, however, that decisive weight must be accorded the fact that the cable is *permanently* attached to her property. But transient demonstrations in the Pruneyard shopping center on busy Saturdays are surely more intrusive than a thin cable occupying a negligible amount of otherwise useless space inside the parapet of a roof.[53]

Thus, "permanence" is no magic talisman. States routinely impose on landlords duties to maintain or install physical equipment: mailboxes, intercom systems, elevator mirrors, and smoke detectors. None of those permanent installations raise problems under the takings clause, because none substantially interferes with the landlord's enjoyment and use of his premises. By the same token, Section 828 is constitutional precisely because the public benefits far outweigh the minimal claimed interests of landlords here.

United States v. *Causby*, 328 U.S. at 266 ("Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land"); *United States* v. *Cress*, 243 U.S. 316, 328 (1917) (damage must be substantial for taking to be found); *United States* v. *Lynch*, 188 U.S. 445, 468 (1903) (same); *Pumpelly* v. *Green Bay Co.*, 80 U.S. 166, 181 (1871) (same).

Indeed, this Court has rejected a *per se* rule for takings even as to equitable servitudes, holding that the property owner must demonstrate a significant adverse impact on the value of his property as a whole. *See Penn Central*, 438 U.S. at 130 n.27; *Welch* v. *Swasey*, 214 U.S. 91 (1909); *Gorieb* v. *Fox*, 274 U.S. 603 (1927); *Goldblatt*, 369 U.S. 590.

53 Similarly, rent control statutes, which permit tenants to remain in physical possession of apartments after the termination of their leases, lead to forced and lengthy occupation of the landlord's property. Although such physical invasions are far more disruptive to landlords than the minimal invasion here, they are nevertheless not takings. *See Block* v. *Hirsh*, 256 U.S. 135; *Durham Realty Co.*, 230 N.Y. 429, 130 N.E. 601.

III

ASSUMING *ARGUENDO* THAT SECTION 828 CONSTITUTES A TAKING, THE STATUTE NEVERTHELESS WOULD BE CONSTITUTIONAL BECAUSE IT PROVIDES FOR ADEQUATE AND JUST COMPENSATION

Even if Section 828 effected a "taking," the statute would be constitutional because it permits the payment of just compensation to landlords. Section 828(1)(b) provides that a landlord may not demand payment from any cable television company "in excess of any amount which the Commission [New York State Commission on Cable Television] shall, by regulation, determine to be reasonable." The Commission, implementing this statutory mandate, stated that this provision "was to assure that Section 828 did not subject landlords to potentially unconstitutional takings of their property without just compensation" (Jt A49-50).[54]

Pursuant to that statutory mandate, the State Commission in 1973 instituted proceedings to determine just compensation and sought written comments from interested persons concerning the implementation of Section 828. Subsequently, the Commission adopted regulations governing fee applications by landlords under Section 828(1)(b). Those regulations provide that the landlord shall be entitled to payment of a reasonable

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54 Appellant, arguing that this issue is not before the Court, claims that the New York Court of Appeals construed the statute as not requiring any compensation. (Appellant's Brief at 13 n.; *id.* at 17 n.) But the Court construed Section 828 to mean that compensation *is* available to landlords for cables installed for the benefit of tenants, and that the Cable Commission was to determine the proper amount of compensation in the first instance. *Loretto*, 53 N.Y.2d at 142, 154, 440 N.Y.S.2d at 851, 858, 423 N.E. 2d at 328, 335. As noted above, the Commission has conducted compensation proceedings since 1973.

However, the majority opinion added, *in dictum*, that landlords could not obtain compensation for the crossover portion of a cable installation (that is, for the minimal additional section of cable utilized to link the cable system to the adjoining building). That is a *de minimus* issue here since the crossover constitutes only a four to six foot extension of the main cable on appellant's roof.

fee upon Commission approval of a landlord's application setting forth specific facts justifying such a fee.[55]

In 1976, the Commission issued a Statement of General Policy construing the "reasonable fee" provision of Section 828 to mean that the landlord was to receive the same level of "compensation" as he would in a "condemnation procedure" under New York law, because Section 828 was designed to avoid "potentially unconstitutional takings . . . without just compensation" (Jt A49-50). To ascertain the proper level of compensation, the Commission examined approximately 160 landlord applications, as well as several appraisals (JtA46;

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55 *See* N.Y. Admin. Code, tit. 9, §§ 598.2, 598.4 (1980). Contrary to appellant's argument below, this procedure comports fully with due process. The Constitution does not preclude an initial determination of compensation by an expert administrative agency, whose determinations are subject to judicial review. *See United States* v. *Jones*, 109 U.S. 513, 519 (1883) ("All that is required is that it [the proceeding] shall be conducted in some fair and just manner, with opportunity to the owners of the property to present evidence as to its value, and to be heard thereon"); *Anderson Nat. Bank* v. *Luckett*, 321 U.S. 233, 246 (1944) ("What is due process in a procedure affecting property interests must be determined by taking into account the purposes of the procedure and its effect upon the rights asserted and all other circumstances which may render the proceeding appropriate to the nature of the case"); *Dohany* v. *Rogers*, 281 U.S. 362, 369 (1930) (same). *See also Boddie* v. *Connecticut*, 401 U.S. 371, 378 (1971).

Contrary to appellant's claim below, determination of reasonable compensation after the actual placement of the cable on the building does not violate due process. *See Joslin Manufacturing Co.* v. *City of Providence*, 262 U.S. 668, 677 (1923); *Hurley* v. *Kincaid*, 285 U.S. 95, 104 (1932); *Bragg* v. *Weaver*, 251 U.S. 57, 62 (1919); *Crozier* v. *Fried. Krupp Aktiengesellschaft*, 224 U.S. 290, 306 (1912); *American Tel. & Tel. Co. of New Jersey* v. *Ranzenhofer*, 128 N.J. Super, 238, 319 A.2d 754 (App. Div. 1974). Although appellant contends that these cases are applicable only when the beneficiary of the taking is the State itself, she is unable to point to any authority for the proposition that *any* otherwise constitutional scheme of compensation must be invalidated because the hearing on compensation occurs subsequent to the taking. Such a rigid rule of priority would be particularly inappropriate here, since the amount of compensation due landlords will generally be so low that the risk of nonpayment is negligible.

51-52). On the basis of that record, this expert administrative agency found that landlords typically sustained only nominal damages and determined "that *in the absence of a special showing of greater damages* attributable to the taking, the only fee that is reasonable under Section 828(1)(b) of the Executive Law is a nominal one" (*id.*) (emphasis added). Thus, the Commission's rules are clear that upon a special showing of greater damage a landlord may obtain a greater fee. Appellant has never sought compensation from the Commission.

As Judge Gabrielli stated in his concurring opinion below, "it is obvious that a landlord who actually incurs damage to his property or is restricted in the use to which he might put that property will receive compensation commensurate with the greater injury." *Loretto*, 53 N.Y.2d at 155, 440 N.Y.S.2d at 859, 423 N.E.2d at 336. The takings clause requires no more.

CONCLUSION

The decision of the New York State Court of Appeals, upholding the constitutionality of Section 828 of the Executive Law, should be affirmed.

Dated: New York, New York
January 18, 1981

Respectfully submitted,

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Appendix

Excerpt of Affidavit of Jean Loretto, April 21, 1978*

4. When I inspected the roof prior to purchase, I did not see any cables or directional taps, nor did I see any other equipment appearing to belong to either of the Teleprompter Defendants. Nobody told me when I purchased the house of the existence of any CATV equipment on the premises nor that the previous owner had authorized Teleprompter Manhattan to install any such equipment.

5. It was months after my purchase that I first noticed the cables. These are placed along the inside walls of the two parapets, one at the front and one at the back of the house. The material covering the cables is black rubber or plastic. The surface on which the cables are laid was in each case black tar and blended with the color of the cable.

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* This is found at page A77 of Appellant's Appendix submitted to the New York Court of Appeals.

Excerpt of Affidavit of Barry P. Simon in Support of Defendants' Motion For Summary Judgment, February 17, 1978*

31. I cannot underestimate [sic] the significance to New York Cable television companies of the enactment of section 828, which prohibits a landlord's interference with the installation of cable television components upon his property, or the promulgation of the Commission's associated rules, requiring a landlord to apply to the Commission for the determination of a reasonable fee for the cable company's right of access to a landlord's property. Many landlords, prior to the enactment of section 828 refused to allow cable television service to their tenants. In some cases the refusal was absolute and in others, permission to serve the building was granted, but only after the cable company was forced to pay large fees to the landlord which often were as much as 5% of the revenues derived by the cable company from the building. In effect, landlords were levying large private taxes on cable company revenues that would totally incapacitate this newborn industry.

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* This is found at page A114 of Appellant's Appendix submitted to the New York Court of Appeals.

Excerpt from Deposition of Ronald R. Simon, February 24, 1977*

Q. Are there cases in which a line to service subscribers is brought directly from the trunk line into a building without going over other properties other than the city street?

A. Yes, in certain cases.

Q. How is that accomplished?

A. That would be accomplished if it were the first building in the block being served with cable. It would receive the entry from the street of the trunk line and exit back out to the street of the trunk line.

Q. And physically how is that done?

A. It would be an excavation from the Empire City subway manhole to the building, a pipe would be installed between those two points and cable run through the pipe.

Q. In theory that could be done over a distance of a block or more, is that correct?

A. In pure theory, yes. From a practical standpoint it wouldn't be able to be accomplished.

Q. What are those practical considerations?

A. The congestion of equipment already in the street, for one, and the economic and environmental impact.

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* This is found at page A170 of Appellant's Appendix submitted to the New York Court of Appeals.

Amicus Brief

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No. 81-244

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ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October, 1981

JEAN LORETTO, on behalf of herself and all others similarly situated,

Appellant,

v.

TELEPROMPTER MANHATTAN CATV CORP., TELEPROMPTER CORPORATION and CITY OF NEW YORK,

Appellees.

BRIEF OF AMICI CURIAE NATIONAL SATELLITE CABLE ASSOCIATION; MEHL CABLE SYSTEMS, INC.; COMARK, INC.; OMEGA COMMUNICATIONS, INC.; OMEGA SATELLITE PRODUCTS COMPANY

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December 11, 1981

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STATEMENT OF INTEREST

Written consents to the filing of this amici curiae brief have been filed with the Clerk of the Court by counsel to all parties to this action.

This brief in support of the appellant is submitted on behalf of amici curiae, National Satellite Cable Association; Mehl Cable Systems, Inc.; Comark, Inc.; Omega Communications, Inc.; and Omega Satellite Products Company.

Amici view Section 828 of the New York Executive Law and similar statutes as special interest legislation specifically aimed at stifling competition in the market of providing cable television service to tenants. See, Point II, infra. The actual beneficiaries of these statutes are franchised monopolies such as appellee Teleprompter and

franchising authorities such as the City of New York. See Point IB, infra.

The National Satellite Cable Association is a not-for-profit corporation organized under the laws of the State of Illinois. Its members consist of operators of "private cable television systems"[1] and owners of apartment complexes on which such "private" systems are, or may be, located. Private cable television systems are those cable television systems located wholly within the boundaries of private property.

A private cable television system typically consists of an earth station

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[1] For a general description of private cable television companies and their proliferation See, Special Report, Small Earth Stations Blossom Into Big Business, Broadcasting Magazine, Vol. 99, p. 31-38, December 22, 1980.

which receives distant programming signals beamed from an orbiting satellite, headend equipment to amplify the signal received on the earth station, and coaxial cable (identical with the cable used in Teleprompter's franchised systems) running from the headend either directly to an individual residence or to a master antenna system[2] which is, in turn, wired to each residence within the system.

The private cable company furnishes satellite programming to tenants pursuant to agreements with programmers.[3] These agreements are

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[2] A master antenna system consists of the internal wiring within a building running from the base of a central antenna to each residence in the system. The antenna itself may or may not be utilized in the private cable television system.

[3] A private cable system also carries and enhances the signals of local commercial channels.

substantially identical to ones negotiated by franchised companies. The earth station may, at the company's option, be licensed by the Federal Communications Commission, and the company pays copyright fees to the Registrar of Copyrights pursuant to 17 U.S.C.A. §101, et seq.

Distinguished from private systems are franchised[4] cable television

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[4] The term "Franchise" as used throughout this brief generally refers to the franchise (or license) granted by a local governing body to operate a cable television system within the locality. The power of a municipality (or other local governing body) to franchise cable operations has historically been linked to the municipality's right to regulate its public streets. See, Annotation, Validity and Construction of Municipal Ordinances Regulating Community Antenna Television Service (CATV), 41 A.L.R.3d 384 (1972). New York Executive Law, Article 28, §819 requires a franchise for any "cable television system operating within the municipality" whether or not such system uses public streets. However, in New York, systems serving less than 1,000 subscribers require neither a municipal or state franchise. New York Executive Law, §813.

systems. These systems, such as the one operated by appellee Teleprompter, receive local and distant signals at a central location. From there they are transmitted to subscribers within the franchise area through coaxial cable which is hung on telephone poles over, or laid in, public streets, rights of way or easements. As the sole franchisee in its area, Teleprompter enjoys a virtually unchallenged monopoly in that cable television market.

The distinction between private and franchised cable television companies is recognized throughout the industry. The Federal Communications Commission regulates franchised cable companies such as Teleprompter. See, 47 C.F.R. §76.1, et seq. On the other hand, private cable systems located

wholly on private property under common ownership are exempt from most FCC regulation. 47 C.F.R. §76.5

Mehl Cable Systems, Inc. (hereinafter "MCS") is an Arizona corporation engaged in the development and operation of private cable television systems in the Tucson and Phoenix, Arizona metropolitan areas. MCS currently operates, under written agreements with apartment owners, four private cable television systems capable of serving 1,000 apartment units. MCS is currently in the process of constructing seven additional private systems which will serve 2,000 units. In addition to its private systems, MCS is constructing and operating a franchised cable television system utilizing public streets and rights of way pursuant to a license agreement with the Board of Supervisors

of Pima County, Arizona.

Comark, Inc. is a Michigan corporation which is engaged in the development of private cable television systems in the State of Indiana. Comark currently operates, under written agreement with apartment, condominium and mobile home park owners, fifteen private cable systems capable of serving approximately 7,000 units. Comark is in the process of constructing (or holds contracts to construct) eleven additional systems which will serve approximately 7,300 units.

Omega Communications, Inc. is an Indiana corporation which manages or owns 25 affiliated franchised cable television systems pursuant to license or franchise agreements with local governing bodies in the States of Indiana, Illinois, Michigan, Missouri,

Pennsylvania and New Mexico.[5]

Omega Satellite Products Co. (hereinafter "Omega Satellite"), is an affiliate of Omega Communications, Inc. Omega Satellite is an Indiana Limited Partnership which is engaged in the business of owning, operating and developing private cable television systems for apartment complexes, condominiums, motels and land developments in the States of Indiana and Michigan. It currently owns and operates eighteen private cable television systems serving approximately 5,000 units and is currently developing two additional systems to serve another 400-500 units.

In connection with their franchised systems, MCS and Omega Communications, Inc. distribute their

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[5] Two of Omega's systems (in Michigan and Pennsylvania) utilize public streets without formal franchise agreements.

television signals through coaxial cable which is either buried in public and private streets (with the permission of the property owner) or hung on telephone poles (with the permission of the telephone company). They also frequently contract with owners of apartment buildings or complexes to whom they pay fees of as much as 10% of the gross income collected from tenants. Alternatively, these franchised companies offer landlords a "bulk" rate to furnish cable television to all units within their complex or building.

Each of MCS's, Comark's and Omega Satellite's private cable systems are located wholly within private property. In each instance the property owner grants the private cable company the exclusive right to furnish cable television service to residents or occu-

pants of the property for the term of their agreement. Exclusivity for a minimum number of years (determined by negotiation) is required in order to assure the private company a fair opportunity to recoup its sizeable investment in constructing the system.[6]

The financial arrangements between the private cable company and the property owner are dependent upon how the property owner and the cable company determine, by negotiation, to provide cable television service to individual subscribers. Some apartment owners pay the private cable company a flat monthly fee, for which the cable company furnishes a basic satellite

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[6] The average cost of a typical private system serving a 300-unit apartment complex (including the cost of the satellite dish and headend equipment; installation costs; and MATV rewiring) is approximately $65,000.00.

channel package, together with all local stations, to all apartment units within the complex. The apartment owner in this arrangement presumably expects to be able to raise his rents or increase his occupancy rate (or both) by virtue of his ability to provide "free" cable television to his tenants. "Premium" channels (not included in the basic package) may be furnished to individual tenants by either the landlord or the owner, again depending upon the course of their negotiations.

Private cable companies can provide cable service at a reduced "bulk" rate since their operational and administrative costs (bookkeeping, bad debts, costs of connecting and disconnecting units, etc.) are substantially decreased by not having to deal with individual tenants.

Some owners are not willing to obligate themselves for payments to the private cable company for the term of the agreement. However, this owner may consent to granting a private cable company an "exclusive" if the cable company deals directly with tenants and pays the owner a "royalty" based on a percentage of the operator's gross receipts from the system. This arrangement is similar to the agreements which Teleprompter made with landlords prior to the enactment of Section 828. JtA 32.

Some private cable companies sell all of the system's hardware to an Owner. Under this arrangement, the private cable company contracts with the Owner to operate the Owner's system but gives the Owner the right to terminate the contract if the Owner feels that he can do a better job of

running the system himself.

The above examples demonstrate how private cable television companies and apartment owners are providing cable television service to apartment tenants. Amici believe that Section 828 of the Executive Law and similar statutes threaten the survival of the private cable television industry.

SUMMARY OF ARGUMENT

The fact that Section 828 authorizes the slightest physical invasion of private property should be dispositive of the issue of whether or not the statute authorizes a taking without provision for just compensation.

From amici's perspective as owners and operators of both private and franchised cable television systems who deal with owners of rental property on

a day-to-day basis, the majority opinion below reflects a basic misunderstanding of the broad extent of the physical invasions authorized by Section 828. Point I will address itself to that issue and to the lower court's unwarranted distinction between a taking by a private corporation and a taking by government. From the same perspective, Point II will address the issue of the economic impact of the statute on owners of rental property, tenants and owners of private cable television systems.

ARGUMENT

POINT I

THE EXTENT OF THE PHYSICAL INVASION AUTHORIZED BY SECTION 828 REQUIRES APPLICATION OF THE *PER SE* RULE THAT PHYSICAL INVASIONS BY GOVERNMENT OR WITH GOVERNMENTAL AUTHORIZATION CONSTITUTE "TAKINGS" WHICH REQUIRE THE PAYMENT OF JUST COMPENSATION

A. *The Slightest Uninvited Physical Invasion of Real Property Requires the Payment of Just Compensation*

Amici strongly support appellant's position that in a physical invasion case such as the one before the Court, an inquiry into the extent of the intrusion is unnecessary to determine

whether or not a taking has occurred.[7] Since this point has been fully addressed by Chief Judge Cooke in his dissenting opinion, 440 N.Y.S.2d at 859-864, and by appellant's brief (Point I), amici will not repeat these arguments. However, amici feel it is necessary to analyze the extent of the invasion authorized by Section 828 in

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[7] See e.g., St. Louis v. Western Union Teleg. Co., 148 U.S. 92 (1893); Western Union Teleg. Co. v. Pennsylvania R. Co., 195 U.S. 540 (1904); Kaiser Aetna v. United States, 444 U.S. 164, 180 (1979); Bunke v. New York Tel. Co., 111 App. Div. 241, 97 N.Y.S. 66 (1st Dept; 1905), aff'd 188 N.Y. 600, 81 N.E. 1161 (1907) (unauthorized attachment of wires to roof to reach other property); Osborne v. Auburn Tel. Co., 189 N.Y. 393, 82 N.E. 428 (1907) (unauthorized use of highway right of way); Butler v. Frontier Tel. Co., 186 N.Y. 486, 79 N.E. 716 (1906) (trespass by wires which did not physically touch the property); Matteson v. Antenna-Vision, Inc., 54 Misc.2d 859, 283 N.Y.S.2d 636 (Herkimer Co., 1967) (cable television facilities); See 26 Am.Jur.2d Eminent Domain §§58, 161; 2 Nichols, Law of Eminent Domain (Rev. 3rd Ed.) §§6.1[1], 6.2 and 6.21.

light of the treatment of that subject in the majority opinion below.

B. Section 828 Authorizes Substantial, Repeated Physical Invasions onto Private Property

From the perspective of amici who operate public and private cable television systems in suburban and rural (as well as urban) areas of the country, the analysis by the New York Court of Appeals of the nature of the physical invasion authorized by Section 828 is insufficient because it is limited to one building in upper Manhattan. The statute authorizes a broad spectrum of physical invasions notwithstanding the allegedly "minimal" physical invasions of appellant Loretto's building. Furthermore, as discussed below, the statute authorizes repeated invasions by one or more

companies. Amici strenuously contest the assertion by the Court of Appeals that the invasions authorized by Section 828 are "minimal", 440 N.Y.S.2d at 859, and "take up negligible unoccupied space". Id. at 857.

This statute applies to rental property throughout New York State. Thus, the statute proscribes the conduct of an owner of a garden apartment complex located on 15 acres in suburban Oswego[8] to the same extent that appellant Loretto's conduct is proscribed in upper Manhattan.

For the purpose of argument, assume that our Oswego property owner has constructed a garden apartment complex on his 15 acre site consisting

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[8] One of the municipalities in which appellee operates a franchised system. JtA 17

of 20 separate buildings, each containing 20 apartment units. Further assume he has exquisitely landscaped his property and placed amenities such as swimming pools, tennis courts and recreational facilities for the use of his tenants throughout the grounds.[9]

Section 828 prohibits[10] our hypothetical landlord from preventing a cable television company from entering his garden apartment complex with men and material and laying underground cable throughout the entire complex from the street to building No. 1, from building No. 1 to building No. 2, from building No. 2, etc., and up and down

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[9] In fact, a significant number of the properties on which amici's private systems have been installed have physical characteristics substantially similar to this example.

[10] Subject to "reasonable" safety, function and appearance conditions, and indemnification agreements as to the adequacy of which, see p. 21, infra.

the walls of each building. Such permanent physical invasions could occupy a substantial portion of the grounds of the garden apartment complex as well as the walls of each building. Section 828, as interpreted by the New York Court of Appeals, would dictate this result even if the owner had constructed his own private cable television system during the course of constructing his complex.[11]

Furthermore, assume that more than one cable television company is competing for subscribers in the Town

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[11] It should be noted that if a private cable television company had constructed this system for the owner in return for an "exclusive" on the property prior to the enactment of Section 828, the statute would substantially impair the obligation of contract in contravention of Article I, Section 10 of the United States Constitution.

of Oswego.[12] Section 828 contains no limitations as to the number of physical invasions which must be borne by an apartment owner. Accordingly, an owner's rental property is subject to not one but unlimited invasions by competing companies.

Nor can it be maintained that subsections (i), (ii) and (iii) of section 4 (1)(a) of Section 828 adequately protect the apartment owner from the physical invasions which he is

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[12] Article 28 of the Executive Law contains no requirement that a municipality grant exclusive franchises. Some areas of the country have, in fact, adopted a policy of granting non-exclusive franchises. See e.g., Pima County, Arizona Cable Television Ordinance, 1981-64 (8 companies presently hold overlapping franchises in one area); Cable Television Ordinance of the City of Phoenix, Arizona, Ordinance J 1636 (four companies presently hold city-wide franchises); Code of Metropolitan Dade County, Florida, §8A-139 (prohibiting the granting of exclusive franchises).

powerless to stop. What kind of conditions can an owner of a garden apartment complex impose that would protect the appearance of his buildings from cables running up and down his walls? Furthermore, there is no provision to limit the invading company from installing "cable television facilities" within the walls of buildings.

It is true that a cable television company must, by the terms of subsections (ii) and (iii), agree to bear the entire cost of installation, operation or removal of such facilities and agree to indemnify the landlord from any damage caused by such installation, operation or removal. But these agreements are only as strong as the financial condition of the cable company making the agreement. In the free marketplace, oftentimes a cable

company's financial strength (or lack thereof) determines whether a contract is signed. Under Section 828, a property owner's freedom to reject an installation by a company which may not have the wherewithal to back up its indemnification has been taken away.

As set forth above, the physical invasions authorized by Section 828 are far from "minimal" and clearly can occupy far more than "negligible unoccupied space". Amici respectfully submit that Section 828 authorizes repeated, intentional, permanent and substantial physical invasions and occupations of private property without provision for the payment of just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

C. The Constitutional Requirement that Just Compensation Must be Paid Applies to the Takings Of Property by Private Corporations Acting Pursuant to Government Authorization

It is respectfully submitted that the New York Court of Appeals misinterpreted this Court's rulings in Pennsylvania Central Transportation Co. v. New York City, 438 U.S. 104, (1979), [hereinafter Penn Central] and in PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980)[13] [hereinafter PruneYard]. The majority cites these cases to support its conclusion that as long as a taking is done by a private entity acting pursuant to police power

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[13] See the dissenting opinion of Chief Judge Cooke, 440 N.Y.S.2d at 843, 859, 862.

authorization from the state, the taking need not be compensated. 440 N.Y.S.2d at 854. Amici dispute that legal assertion as well as the "facts" upon which it is based.

1. A Taking by a Private Corporation Acting Pursuant to Governmental Authorization is Compensable

In Penn Central, supra, this Court stated:

> "a 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, see, e.g. United States v. Causby, 328 U.S. 256 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good". 438 U.S. at 124.

The New York Court of Appeals distinguishes Penn. Central, supra, as well as New York Tel. Co. v. Town of North Hempstead, 41 N.Y.2d 691, 395 N.Y.S.2d 143 and Delaware, Lackawanna

& Western R.R. Co. v. Town of Morristown, 276 U.S. 182 (1928), by unduly emphasizing the phrase "by government". 440 N.Y.S.2d at 854.

Thus, the admitted physical invasion is somehow sanitized because a private party, acting under government authorization does the invading. This is a distinction without a difference as noted in Professor Michaelman's criticism of the "enterprise vs. arbitral" test relied on so heavily below:

> "If there is something 'wrong' with deliberate collective action which diminishes a few people's welfare in the course of augmenting the welfare of 'the public' at large, why is that something not as virulently present when those who stand to benefit at the expense of these same few people are 'private' property owners rather than a 'public' one." Michaelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1200-01 (1967).

As indicated in Point I A, supra, physical takings by private corporations have consistently been held to be compensable. See cases cited at fn 7, p. 16. The recitation that an action is being taken pursuant to a state's power to regulate landlord-tenant relationships (440 N.Y.S.2d at 858) coupled with the deputizing of a private corporation as the taking authority is nothing more than a charade. In fact, the invasions made by Teleprompter pursuant to the authority of Section 828 are indistinguishable, other than in mere form, from the condemnation of easements over rental property by the City of New York and a subsequent conveyance of those easements to Teleprompter.

2. The "Taking" in the Case Before this Court was Done by Teleprompter and by the City of New York

Amici submit that the physical invasions authorized by Section 828 were committed by both Teleprompter and the City of New York. Facially, it would appear that the "taker" and primary beneficiary of the physical invasion in the case before the Court is Teleprompter, a private, profit-making corporation. It is apparent that Teleprompter no longer has to pay landlords a fee for the privilege of entering upon their property. In addition, Teleprompter has effectively been insulated from competition from private cable companies. See Point II, infra.

A closer analysis reveals that the "private" invasions authorized by

Section 828 are carried out for the mutual benefit of the franchised cable company and the franchising authority. Obviously, the City of New York's franchise fee is increased by virtue of Teleprompter's increased gross revenue.

However, it should be emphasized that increased revenue is by no means the only benefit which flows to the franchising authority by virtue of the invasions authorized by Section 828. The franchise agreement between the City of New York and Teleprompter provides, inter alia, that Teleprompter is required to (a) transmit without charge City-originated programs and messages on designated municipal channels; and (b) provide public access channels without charge to the public on a first come, first-served basis. JtA 155.